# Chapter 25: Recordkeeping & Reporting Requirements

# 25

## In this chapter. . .

This chapter discusses recordkeeping and reporting requirements regarding juveniles subject to delinquency and criminal proceedings. The following subjects are discussed in this chapter:

- What records must the Family Division of Circuit Court keep regarding juveniles within its jurisdiction?
- Who has access to those records and for what purposes?
- When may such records be destroyed?
- What records must the Department of State Police and Secretary of State keep regarding juveniles?
- What is the effect of "setting aside" an adjudication or conviction?
- When must a juvenile register as a sex offender?
- When must a juvenile provide a DNA sample?
- When must a juvenile be tested for venereal disease or AIDS, and who has access to the test results?

**Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and "traditional waiver" proceedings, and to Subchapter 6.900, which govern "automatic waiver" proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of

this benchbook, *Juvenile Justice Benchbook:Delinquency & Criminal Proceedings* (MJI, 1998).

## 25.1 Family Division Records

MCR 3.903(A)(24) defines "records" as pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders. These items are contained in the so-called "legal file." Confidential information is contained in the so-called "social file."* For a general description of the purposes and contents of "juvenile court" records, see AO 1985-5, as amended by 1988-3, Part II, 430 Mich xcix (1988). A "file" is "a repository for collection of the pleadings and other documents and materials related to a case. MCR 3.903(A)(8).

*See Section 25.2, below, for discussion of confidential Family Division records.

A "register of actions" is "the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards." MCR 3.903(A)(25). The clerk of the court must permanently maintain a register of actions for each case except a civil infraction case. MCR 8.119(A) and (D)(1).* The Michigan Supreme Court Case File Management Standards and MCR 8.119(D)(1)(c) require a register of actions to contain at least the following:

*See, however, Sections 25.16 and 25.17, below, for discussion of setting aside juvenile adjudications and criminal convictions. An order setting aside an adjudication may be recorded in the register of actions, limiting subsequent access to information regarding a juvenile by employers, military recruiters, and others.

- case number;
- case type (code);
- case name;
- attorneys;
- date filed;
- fees paid (when applicable);
- offense;
- judge assigned (code);
- process issued and returned and date of service;
- date and title of each "filed" document;
- date of each event, type of action, and result;
- date of scheduled trials, hearings, and all other appearances or reviews;
- judge at adjudication (code);
- date adjudicated;

- how adjudicated (code);
- location of papers filed apart from the case folder (e.g. exhibits, video tapes, audio tapes, or court reporter log); and
- fees for officers, transportation, and jurors (if not maintained in the accounting system).

The county clerk is the clerk of the court for the Family Division and keeps the records and indexes of actions. MCL 600.1007.

## 25.2 Access to Family Division Records and Confidential Files

**Access to court records.** The general rule is that "[r]ecords of the juvenile cases, other than confidential files, must be open to the general public." MCR 3.925(D)(1). Records created before June 1, 1988, are open only by court order to persons with a legitimate interest. MCL 712A.28(1).

**Confidential files.** Confidential files are defined in MCR 3.903(A)(3)–(4). Those rules state as follows:

> "(3) Confidential file means
>
> (a) that part of a file made confidential by statute or court rule, including, but not limited to,
>
> (i) the diversion record of a minor pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.*;*
>
> (ii) the separate statement about known victims of juvenile offenses, as required by the Crime Victim's Rights Act, MCL 780.751 *et seq.*;*
>
> (iii) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);*
>
> (iv) the dispositional reports pursuant to MCR 3.943(C)(3)* and MCR 3.973(A)(4)(c);
>
> (v) fingerprinting material required to be maintained pursuant to MCL 28.243;*
>
> (vi) reports of sexually motivated crimes, MCL 28.247;
>
> (vii) test results of those charged with certain sexual offenses or substance abuse offenses, MCL 333.5129;*

*See Section 4.4.

*See Section 25.9, below.

*See Section 7.12.

*See Section 10.6.

*See Section 25.12, below.

*See Section 25.20, below.

> "(b) the contents of a social file maintained by the court, including materials such as
>
> (i) youth and family record sheet;
>
> (ii) social study;
>
> (iii) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);
>
> (iv) Family Independence Agency records;
>
> (v) correspondence;
>
> (vi) victim statements."

Petitions that the court has not authorized for filing do not fall within the definition of "records" in MCR 3.903(A)(24)* and are therefore "confidential files."

*See Section 25.1, above, for the definition of "records."

If a document from a juvenile's confidential or "social" file is admitted into evidence, that document becomes a "record," as the definition of "record" includes "exhibits." MCR 3.903(A)(24).

**Access to confidential files.** MCR 3.925(D)(2) provides that confidential files shall only be made accessible to persons found by the court to have a legitimate interest. In determining whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;
- the welfare and safety of the public;
- the interests of the juvenile; and
- any restriction imposed by state or federal law.

Restrictions imposed by state and federal law include 20 USC 1232g(b)(1) and MCL 600.2165, educational records; MCL 330.1748, records of mental health services; 42 USC 290dd—2(a) and MCL 333.6111, records of federal or state drug or alcohol abuse prevention programs; and MCL 333.17752, records of prescriptions.*

*Discussion of these confidentiality provisions is beyond the scope of this benchbook. See, however, Section 9.11 (admissibility of attendance reports in truancy cases) and Section 10.6 (abrogation of privileges in disposition hearings).

Court records and confidential files are not subject to requests under the Freedom of Information Act, as the judicial branch of government is specifically exempted from that act. MCL 15.232(d)(v).

> **Note:** No provision of the Juvenile Code makes confidential a juvenile probation or court officer's file. A juvenile probation or court officer's file may contain case notes and copies of records whose confidentiality is protected by other law. See MCL 791.229, which contains a "probation officer's privilege," but which is only applicable to Department of Corrections probation officers.

## 25.3 Recording Proceedings in the Family Division

MCR 3.925(B) states that "[a] record of all hearings must be made." That subrule also requires that a record of all proceedings on the formal calendar be made and preserved by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded. "Formal calendar" means judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing. MCR 3.903(A)(10). However, in cases involving offenses falling under MCL 780.786b(1) of the Crime Victim's Rights Act, the court must conduct a preliminary inquiry on the record. MCR 3.932(A).*

*See Section 4.3.

If a record of a hearing is made by a recording device, transcription of the hearing is unnecessary unless there is a request by an "interested party." MCL 712A.17a states that such a recording remains a permanent record of the court. However, MCL 600.2137(3) requires courts to maintain untranscribed recordings for 15 years in a felony case and 10 years in other cases; if a record has been transcribed, the court need maintain a recording for only one year.

## 25.4 Access to Records of Closed Proceedings

**Delinquency cases.** If a hearing in a delinquency case is closed to the general public under MCL 712A.17, the records of that hearing shall only be open by order of the court to persons having a legitimate interest. MCL 712A.28(2).*

*See Section 25.2, above, for criteria to determine whether a person has a legitimate interest. See Section 7.12 for discussion of closing delinquency proceedings to the general public.

MCL 712A.28(2) excepts MCL 780.799 of the Crime Victim's Rights Act from its scope. MCL 780.799 provides that, upon request, a victim shall be given a certified copy of the order of an adjudicative hearing for purposes of obtaining relief under the "parental liability statute," MCL 600.2913. This statute provides for vicarious and strict liability of the parents of an unemancipated minor who has willfully or maliciously destroyed real or personal property or caused bodily harm or injury to another. The statute limits recovery to $2,500.00. MCL 600.2913 states:

> "A municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or an incorporated or unincorporated religious organization may recover damages in an amount not to exceed $2,500.00 in a civil action in a court of competent jurisdiction against the parents or parent of an unemancipated minor, living with his or her parents or parent, who has maliciously or willfully destroyed real, personal, or mixed property which belongs to the municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or religious organization incorporated or unincorporated or who has maliciously or willfully caused bodily harm or injury to a person."

In *McKinney v Caball,* 40 Mich App 389, 390–91 (1972), the Court of Appeals noted that the "parental liability statute" was enacted in derogation of the common law, which did not provide for parents' liability for the conduct of their children. Thus, the statute must be strictly construed to require plaintiffs to show the juvenile's malicious or willful destruction of property or bodily harm before they may recover any damages from the parents.

A plaintiff may choose to sue a juvenile's parent for negligent supervision rather than proceeding under MCL 600.2913. "Parents may be held liable for failing to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to know of the necessity and opportunity for doing so." *Zapalski v Benton,* 178 Mich App 398, 403 (1989), citing *Dortman v Lester,* 380 Mich 80, 84 (1968).

In *Zapalski, supra,* the parents of a 14-year-old boy who allegedly sexually assaulted a 14-year-old girl were found not liable for negligently failing to

supervise their son. Although their son had a history of delinquent behavior, nothing in their son's background would have enabled his parents to foresee his sexually assaultive behavior.

**Criminal cases.** Unless made confidential by statute, court rule, or court order, court records in criminal cases are open to the public. MCR 8.119(E)(1). A court may seal its records in a case upon motion of any person if the court finds good cause to seal its records, and if there is no less restrictive means to adequately and effectively protect the specific interest asserted." MCR 8.119(F)(1).

MCR 8.116(D) provides a procedure through which any person may challenge a court-ordered limitation on access to records of closed court proceedings. That rule states:

> "**Access to Court Proceedings.** When a court has ordered, or has pending before it a request to order, a limitation on the access of the public to court proceedings or records of those proceedings that are otherwise public, any person may file a motion to set aside the order or an objection to entry of the proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. . . ."

## 25.5 Access to Juvenile Diversion Records

*See Section 4.4 for a detailed discussion of diversion.

The Family Division must keep diversion* information in a separate record. MCL 722.827. MCR 3.903(A)(3)(a)(i) provides that a juvenile's diversion record is a "confidential file," open only to persons with a legitimate interest. MCL 722.828(1)–(2) and 722.829(1) add that this record is open to law enforcement agencies and court intake workers and, by order of the court, to persons having a legitimate interest, but only for the purpose of deciding whether to divert a minor. These records must be destroyed within 28 days after the minor becomes 17 years of age. MCL 722.828(3).

## 25.6 Destruction of Family Division Files and Records

MCR 3.925(E) governs the destruction of Family Division files and records. MCR 3.925(E)(1), which sets forth a general rule regarding destruction of files and records, states as follows:

> "The court may at any time for good cause destroy its own files and records pertaining to an offense by or against a minor, other than an adjudicated offense described in MCL 712A.18e(2), except that the register of actions must not be destroyed. Destruction of a file does not negate, rescind, or set aside an adjudication."*

*See Section 25.16, below, for the requirements to set aside an adjudication.

A "register of actions" is "the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards." MCR 3.903(A)(25). See Section 25.1, above, for a description of the contents of the register of actions.

MCR 3.925(E)(2)(c) states that, except for diversion and consent calendar cases, "the court must destroy the files and records pertaining to a person's juvenile offenses, other than any adjudicated offense described in MCL 712A.18e(2), when the person becomes 30 years of age. MCL 712A.18e(2) lists offenses that if committed by an adult would be felonies punishable by life imprisonment and criminal violations of the Michigan Vehicle Code.*

*Criminal Division files must be maintained for 25 years after the last activity in the case. Final judgments and orders are permanent court records. MCL 600.2137(4).

**Note:** Former MCR 3.913 provided:

> "The court may retain a child's juvenile court delinquency records other than those involving motor vehicle violations until the child is 27, when they must be expunged. The court may retain a child's motor vehicle violation citations and summonses until the child is 19, when they must be expunged."

Effective January 1, 1988, former rule MCR 3.913 was superseded by MCR 3.925(E), and delinquency records may now be retained until age 30, with certain exceptions for life offenses. Motor vehicle violation citations are never expunged.

Offenders who had pre-1988 juvenile records and who believe that their offenses were or will be expunged at age 27 are chagrined to learn that MCR 3.925 now controls record expungement, and that the restrictions of MCR 3.925(E) now make life offenses and criminal traffic violations permanent records of the court.

**Criminal traffic violations.** MCR 3.925(E)(2)(c) requires that the court permanently maintain a record of "adjudicated" criminal traffic violations committed by a juvenile. A subsection of the Michigan Vehicle Code, MCL 257.732(20), adds that "notwithstanding any other provision of law, a court shall not order expunction of any *violation reportable to the secretary of state* under [MCL 257.732]" (emphasis added). MCL 257.732 requires the court to send an abstract of the court record to the Secretary of State following an adjudication or disposition of a criminal violation of the Michigan Vehicle Code.

MCL 712A.2b allows a court to enter an order of disposition if it finds the accusation to be true. It is unclear whether cases are "adjudicated" when the court is proceeding informally under MCL 712A.2b. The term "adjudication," in the context of a case handled under §2b, is ambiguous. If the court does not adjudicate the offense or enter a dispositional order under §18 of the Juvenile Code, it is not required to maintain a permanent record of a criminal traffic violation committed by the juvenile.

**Diversion records.** MCR 3.925(E)(2)(a) deals with diversion records. Under this rule, the court is required to destroy a juvenile's diversion record within 28 days after the juvenile's 17th birthday.

**Consent calendar records.** MCR 3.932(C)(7) and MCR 3.925(E)(2)(b) deal with the files and records of cases placed on the consent calendar. MCR 3.932(C)(7) covers cases in which the juvenile successfully completes a consent calendar case plan. That rule states as follows:

> "Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar."

MCR 3.925(E)(2)(b) states that "[t]he court must destroy all files of matters heard on the consent calendar within 28 days after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If a case is transferred to the consent calendar and a register of actions exists, the register of actions must be maintained as a nonpublic record."

**Permanent records of cases heard on the formal calendar.** MCR 3.925(E)(2)(d) requires the court to preserve several records of cases heard on the formal calendar. That rule states as follows:

> "If the court destroys its files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation."

## 25.7 Use of Evidence and Records in Subsequent Delinquency or Criminal Proceedings

A provision of the Juvenile Code restricts the use of evidence from juvenile delinquency cases in subsequent proceedings. MCL 712A.23 states as follows:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]."

**Use of evidence and testimony at trial following "traditional waiver" proceedings.** In *People v Hammond,* 27 Mich App 490 (1970), the defendant argued on appeal that the trial court erred by considering physical evidence at trial that had been introduced during a "traditional waiver" proceeding. The Court of Appeals disagreed, holding that MCL 712A.23 did not affect the admissibility at trial of both physical evidence and testimony offered during a "traditional waiver" proceeding:

> "It is our conclusion that the intent of the statute is to proscribe the actual testimony taken at the juvenile proceedings. It is not meant to preclude the physical evidence, nor is it meant to exclude a witness who testified at the juvenile proceedings from testifying on the same subject matter at a subsequent trial for the same offense." *Id.* at 494.

See also *People v Pennington,* 113 Mich App 688, 697–98 (1982) (the trial court did not err in allowing the waiver-hearing testimony of an accomplice to be read to the jury, where the accomplice asserted his Fifth Amendment privilege against self-incrimination at trial).

**Designated case proceedings.** The prohibition contained in MCL 712A.23 does not apply to evidence derived from a criminal conviction following designated proceedings in the Family Division. The conviction of a juvenile following designated proceedings has "the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7).

**Use of juvenile adjudications to determine whether to sentence a juvenile in the same manner as an adult and to determine the length of sentence.** MCL 712A.23 does not prevent a judge from considering an adult criminal defendant's juvenile offense record when imposing sentence upon the adult defendant. *People v McFarlin,* 389 Mich 557, 561 (1973). In *People v Coleman,* 19 Mich App 250, 255–56 (1969), the Court of Appeals held that MCL 712A.23 did not prevent the use of a defendant's juvenile offense record at sentencing following "traditional waiver" proceedings. The Court concluded that use of the term "evidence" in MCL 712A.23 limited its prohibition to "testimony and matters actually presented at trial." *Id.* at 256. Although *Coleman* involved imposition of an adult sentence upon a juvenile following "traditional waiver" proceedings, the court's rationale

supports use of juvenile records to determine *whether* to sentence a juvenile in the same manner as an adult or commit the juvenile in "automatic waiver" or designated case proceedings. MCL 769.1(3)(c) requires a court to consider a juvenile's delinquency record when making that decision. See also *People v Laughlin,* unpublished opinion per curiam of the Court of Appeals, decided January 24, 1997 (Docket No. 189428), relying on *People v Zinn,* 217 Mich App 340, 342 (1996), and *Carpentier, infra* (the trial court erred by relying on a prior uncounselled juvenile adjudication when deciding whether to sentence the juvenile in the same manner as an adult or to commit the juvenile as a state ward).

**Required procedures to challenge a prior adjudication.** MCR 3.925(G) requires the Family Division to maintain a record of whether a juvenile was represented by an attorney or waived such representation. That rule states:

> "When the juvenile offense record of an adult convicted of a crime is made available to the appropriate agency, as provided in MCL 791.228(1), the record must state whether, with regard to each adjudication, the juvenile had an attorney or voluntarily waived an attorney."

MCL 791.228(1) requires the Family Independence Agency or court to supply the Department of Corrections with information concerning juveniles who have subsequently come within the DOC's jurisdiction. That statute states:

> "(1) The [Family Independence Agency] and the probate court of this state shall furnish to the department information, on request, concerning any individual having a previous record as a juvenile probationer who comes within the jurisdiction of the department."

*See Sections 25.16 and 25.17, below, for the requirements to set aside an adjudication or conviction.

A sentencing court must not consider prior convictions or juvenile adjudications if the convictions or adjudications were obtained in violation of the constitutional right to counsel. *United States v Tucker,* 404 US 443, 445–46 (1972), *People v Moore,* 391 Mich 426, 436–38 (1974), and *People v Hannan (After Remand),* 200 Mich App 123, 128–30 (1993) (court may not use counselless convictions to score sentencing guidelines). However, in *People v Daoust,* 228 Mich App 1, 17–20 (1998), the Court of Appeals held that a sentencing court may consider an uncounselled prior juvenile adjudication if no actual "incarceration" resulted from the adjudication. A sentencing court may also consider a defendant's juvenile record that has been set aside. *People v Smith,* 437 Mich 293, 302–04 (1991).*

To challenge the validity of prior convictions or adjudications, the defendant must:

- present *prima facie* proof that a previous conviction or adjudication was violative of his or her constitutional right to

counsel, such as a docket entry showing the absence of counsel or a transcript evidencing the same, or

- present evidence that he or she has requested these records from the sentencing court and it has failed to reply or refused to furnish copies of the records within a reasonable time (four weeks).

Upon such a showing, a hearing must be held where the burden shifts to the prosecutor to establish the constitutional validity of the prior conviction or to show affirmative record evidence of waiver. Unless the prosecutor shows such evidence within one month of the defendant's motion, the matter must be set for a hearing. *Moore, supra* at 440–41, and *People v Carpentier,* 446 Mich 19, 35 (1994) (where a "juvenile court" record has been expunged, a criminal defendant must present proof that his or her previous adjudication was obtained in violation of the right to counsel).

**Use of evidence of juvenile's conduct that did not result in adjudication.** A sentencing judge may consider criminal conduct of which a defendant has been acquitted, as long as the defendant has an opportunity to challenge the accuracy of the allegations and the judge finds their accuracy supported by a preponderance of the evidence. *People v Ewing (After Remand),* 435 Mich 443, 451–53, 462–63 (1990). Incidents that occurred while the defendant was a juvenile but that did not result in adjudication may also be considered. *People v Cross,* 186 Mich App 216, 217–18 (1990).

## 25.8 Confidentiality of Public Wards' Records

MCL 803.308 states as follows:

> "All records of a youth agency pertaining to a public ward are confidential and shall not be made public except as follows:
>
> > (a) If the person is less than 18 years of age, by the agency's authorization when necessary for the person's best interests.
> >
> > (b) If the person is 18 years of age or older, by his or her consent."

A public ward is either:

- a youth accepted for care by a youth agency who is at least 12 years of age when committed to the youth agency by the family division of circuit court under MCL 712A.18(1)(e) and the act for which the youth is committed occurred before his or her 17th birthday, or

- a youth accepted for care by a youth agency who is at least 14 years of age when committed to the youth agency by a court of general criminal jurisdiction under MCL 769.1 if the act for which the youth is committed occurred before his or her 17th birthday. MCL 803.302(c)(i)–(ii).

A youth agency is either the Family Independence Agency or a county juvenile agency, whichever has responsibility over a public ward. MCL 803.302(d).

A "county juvenile agency" is an agency operated by a county that has assumed financial responsibility for all juveniles under court jurisdiction in the county. MCL 45.623. A "county juvenile agency" must be created pursuant to the "County Juvenile Agency Act," MCL 45.621 et seq. The act and related amendments to other statutes allow a "county juvenile agency" to provide services to juveniles "within or likely to come within" the Family Division's jurisdiction of criminal offenses by juveniles and the Criminal Division's jurisdiction over "automatically waived" juveniles. Because the act applies only to a county that is eligible for transfer of federal "Title IV-E funds"* under a 1997 waiver, the act apparently only applies to Wayne County. MCL 45.626. The Youth Rehabilitation Services Act, MCL 803.302 et seq., was amended to provide that "Act 150" wards are "public wards" rather than "state wards," because juveniles may be committed to a "county juvenile agency" if one has been created within the county.

*"Title IV-E funds" are federal funds used to partially reimburse states for costs associated with delinquent and dependent children in foster care. See Section 11.1 for further discussion.

## 25.9 Confidentiality Provisions Under the Crime Victim's Rights Act

For any offense falling under the juvenile article of the CVRA, the law enforcement agency must file with the charging document a separate list of the names, addresses, and telephone numbers of each victim. This separate list is not a matter of public record. MCL 780.784.

MCL 780.758(2) limits access to the victim's home and work addresses and telephone numbers in felony cases:

> "The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial."

Under MCL 780.769(1) of the felony article, a victim may request notification from a sheriff or the Department of Corrections of certain post-conviction events, such as escape or parole. The victim's address and telephone number maintained by the sheriff or Department of Corrections

for notification purposes are exempt from disclosure under Michigan's Freedom of Information Act. MCL 780.769(2).

Similarly, in cases under the juvenile article of the CVRA, a victim may request notification from a sheriff or the Department of Corrections of certain post-conviction events regarding a juvenile who was sentenced as an adult following "designated proceedings." Pursuant to MCL 780.798(5), the victim's address and telephone number maintained by the sheriff or Department of Corrections for notification purposes are exempt from disclosure under Michigan's Freedom of Information Act.

Victims of crime have a state constitutional right to be treated with respect for their dignity and privacy. Const 1963, art 1, § 24. To protect this right, all articles of the CVRA exempt from disclosure under Michigan's Freedom of Information Act the following information and visual representations of a crime victim:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim unless the address is used to identify the place of the crime.
>
> "(b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim." MCL 780.758(3)(a)–(b) and MCL 780.788(2)(a)–(b).

However, these provisions "shall not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.758(4) and MCL 780.788(3).

## 25.10 Immunity for Persons or Agencies Furnishing Information to the Court

MCR 3.924 provides immunity to persons or agencies who provide information to the court in response to a request from the court. That rule states as follows:

> "Persons or agencies providing testimony, reports, or other information at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court."

Interpreting the predecessor to MCR 3.924, which was substantially similar to the current rule, the Court of Appeals held that the rule provided absolute immunity only for defamatory statements. *Bolton v Jones,* 156 Mich App 642, 652–53 (1987), rev'd on other grounds 433 Mich 861 (1989).*

*A more complete discussion of immunity from liability is beyond the scope of this benchbook.

## 25.11 Fingerprinting of Juveniles "Arrested" for "Juvenile Offenses"

The Department of State Police maintains criminal identification and criminal history information on juveniles adjudicated or convicted of certain offenses in Michigan. MCL 28.241a(g) ("juvenile history record information" includes name, date of birth, fingerprints, photographs (if available), personal description, and arrests and convictions) and MCL 28.242(1).

When a juvenile is arrested for a "juvenile offense," other than a misdemeanor punishable by 92 days' imprisonment or less, a fine of $1,000.00, or both, the arresting law enforcement agency must take the juvenile's fingerprints and send them to the Department of State Police within 72 hours. MCL 28.243(1). "'Juvenile offense' means an offense committed by a juvenile that, if committed by an adult, would be a felony, a criminal contempt conviction under [MCL 600.2950 or 600.2950a], a criminal contempt conviction for violation of a foreign protection order that satisfies the conditions for validity provided in [MCL 600.2950i], or a misdemeanor. MCL 28.241(h). Misdemeanors include violations of local ordinances that substantially correspond to a state law. MCL 28.241(j)(ii). However, a juvenile's fingerprints need not be taken and forwarded to the department solely for a violation of MCL 257.904(3)(a) (first offense of driving with a suspended or revoked license). MCL 28.243(3).

The Family Division must permit fingerprinting of a juvenile as required by MCL 712A.11(5) and MCL 712A.18(10). MCR 3.936(A). MCL 712A.11(5) states as follows:

> "When a petition is authorized, the court shall examine the court file* to determine if a juvenile has had fingerprints taken as required under [MCL 28.243]. If a juvenile has not had his or her fingerprints taken, the court shall do either of the following:
>
> (a) Order the juvenile to submit himself or herself to the police agency that arrested or obtained the warrant for the arrest of the juvenile so the juvenile's fingerprints can be taken.
>
> (b) Order the juvenile committed to the custody of the sheriff for the taking of the juvenile's fingerprints."

*SCAO Form JC 02 (complaint) contains a checkbox to notify the court that a juvenile's fingerprints have been taken.

Similarly, MCL 712A.18(10) requires the court to examine the court file before the court enters an order of disposition or judgment of sentence to verify that the juvenile has been fingerprinted. That statutory provision states as follows:

> "The court shall not enter an order of disposition for a juvenile offense as defined in [MCL 28.241a], or a judgment of sentence for a conviction until the court has examined the court file and has determined that the juvenile's fingerprints have been taken and forwarded as required by [MCL 28.243], and as required by the sex offenders registration act . . . ."*

*See Section 25.18, below, for fingerprinting requirements under the Sex Offenders Registration Act.

MCR 3.936(B) and MCR 3.943(E)(4) contain substantially similar requirements. MCR 3.936(B)(1)–(2) state that if the juvenile has not been fingerprinted when a petition was authorized or before disposition, the judge or referee must:

> "(1) direct the juvenile to go to the law enforcement agency involved in the apprehension of the juvenile, or to the sheriff's department, so fingerprints may be taken; or
>
> "(2) issue an order to the sheriff's department to apprehend the juvenile and to take the fingerprints of the juvenile."

MCR 3.936 applies to designated proceedings. See MCR 3.951 and 3.955.

In "automatic waiver" cases, the district court must examine the court file at the time of arraignment to determine whether the juvenile has been fingerprinted as required by MCL 28.243. MCL 764.29(1). If the juvenile has not had his or her fingerprints taken prior to arraignment, the magistrate must order the juvenile to submit himself or herself to the arresting agency or order the juvenile committed to the custody of the sheriff so that fingerprints may be taken. MCL 764.29(2)(a)–(b). At sentencing, the court must examine the court file to determine whether the juvenile's fingerprints have been taken. MCL 769.1(2). See also MCL 769.16a(5) and (6), which require a court at sentencing to order fingerprinting for felonies and certain misdemeanors, and to comply with the fingerprinting requirements of the Sex Offenders Registration Act.

If a court orders fingerprints to be taken purusant to MCL 712A.11, MCL 712A.18, MCL 764.29, or MCL 769.1(2), the law enforcement agency that took the fingerprints must forward the fingerprints and arrest card to the Department of State Police. MCL 28.243(6).

## 25.12 Destruction of Fingerprints and Arrest Card

If a petition is not authorized, or if a juvenile is released without being charged, the official taking or holding the juvenile's fingerprints and arrest card must immediately destroy the fingerprints and arrest card. MCL 28.243(7). If the juvenile's fingerprints were forwarded to the Department of State Police, the law enforcement agency must notify the department in writing that a petition was not authorized or that a charge was not made against the juvenile. *Id.*

MCL 28.243(8) provides that if a juvenile is adjudicated and found not to be within the Family Division's jurisdiction over criminal offenses, or if following trial the juvenile is found not guilty, the fingerprints and arrest card must be destroyed by the person holding the information. MCR 3.936(D)(2) requires the court to "direct that fingerprint information in the court file pertaining to the offense be destroyed" in such cases.

However, the provisions of MCL 28.243(8) that require the destruction of fingerprints and arrest cards do not apply if the juvenile "was arraigned in circuit court or the family division of circuit court for any of the following:

> "(a) The commission or attempted commission of a crime with or against a child under 16 years of age.
>
> "(b) Rape.
>
> "(c) Criminal sexual conduct in any degree.
>
> "(d) Sodomy.
>
> "(e) Gross indecency.
>
> "(f) Indecent liberties.
>
> "(g) Child abusive commercial activities.
>
> "(h) A person who has a prior conviction, other than a misdemeanor traffic offense, unless a judge of a court of record, except the probate court, by express order on the record, orders the destruction or return of the fingerprints and arrest card.
>
> "(i) A person arrested who is a juvenile charged with an offense that would constitute the commission or attempted commission of any of the crimes in this subsection if committed by an adult." MCL 28.243(12)(a)–(i).*

*MCR 3.936(D)(1) contains substantially similar requirements as MCL 28.243(8) and (12).

Former MCL 28.243(9)(a), which precluded persons who were acquitted of criminal sexual conduct from obtaining the return of their fingerprint cards, arrest cards, and descriptions from the state police and the arresting police agency did not violate the Equal Protection Clauses of the United States and Michigan Constitutions because denying that return while permitting the return of these documents to persons acquitted of other serious crimes has a rational basis; namely, the particular difficulty in detecting, investigating, and prosecuting criminal sexual conduct offenses. *People v Cooper (After Remand),* 220 Mich App 368, 374 (1996). See also *People v Pigula,* 202 Mich App 87, 89–91 (1993) (statute does not violate defendant's right of privacy).

## 25.13 Fingerprinting and Photographing of Minors in Family Division Custody

A request to fingerprint or photograph a juvenile may be made when police are conducting investigations of other matters and are seeking to link the juvenile to or exclude the juvenile from commission of other offenses. MCR 3.923(C) states that the court may permit fingerprinting or photographing or both* of a juvenile when a petition has been filed. The fingerprints and photographs must be placed in the confidential file, capable of being located and destroyed on court order.

*See SCAO Form JC 16. Juveniles are also subject to placement in lineups. See Section 7.4.

MCR 3.923(C) applies to all delinquency cases and is discretionary with the court. It should not be confused with the fingerprinting requirements contained in MCL 28.243(1) and MCR 3.936(B) which make it mandatory for the police to take fingerprints of all juveniles who are arrested for "juvenile offenses."*

*See Section 25.11, above, for discussion of those requirements.

The court may not require a juvenile to be fingerprinted following completion and closure of a consent calendar case. MCR 3.932(C)(7).

## 25.14 Required Reporting to the Department of State Police

MCL 712A.18(11) states as follows:

> "Upon final disposition, conviction, acquittal, or dismissal of an offense within the court's jurisdiction under [MCL 712A.2(a)(1)], the clerk of the court entering the final disposition, conviction, acquittal, or dismissal shall immediately advise the department of state police of that final disposition, conviction, acquittal, or dismissal on forms approved by the state court administrator, as required by [MCL 28.243]. The report to the department of state police shall include information as to the finding of the judge or the jury and a summary of the disposition or sentence imposed."

MCL 28.243 applies to "juvenile offenses." "'Juvenile offense' means an offense committed by a juvenile that, if committed by an adult, would be a felony, a criminal contempt conviction under [MCL 600.2950 or 600.2950a], a criminal contempt conviction for violation of a foreign protection order that satisfies the conditions for validity provided in [MCL 600.2950i], or a misdemeanor. MCL 28.241(h). Misdemeanors include violations of local ordinances that substantially correspond to a state law. MCL 28.241(j)(ii).

MCL 28.243(8) requires the clerk of the court that enters a final disposition to notify the Department of State Police of a finding of not guilty or not guilty by reason of insanity, a dismissal, a *nolle prosequi,* or a finding that a juvenile is not under the Family Division's jurisdiction of criminal offenses. If the juvenile was found within the Family Division's jurisdiction of criminal offenses, or if the juvenile was convicted of a criminal offense, the clerk of the court that enters the final disposition must transmit a summary of the conviction and disposition or sentence to the Department of State Police. MCL 28.243(9).

MCR 3.936(C)(1)–(2) summarizes the requirements applicable to delinquency and designated cases. These rules state that the Family Division must notify the Central Records Division of the Department of State Police in writing:

> "(1) of any juvenile who had been fingerprinted for a juvenile offense and who was found not to be within the jurisdiction of the juvenile court under MCL 712A.2(a)(1); or
>
> "(2) that the court took jurisdiction of a juvenile under 712A.2(a)(1), who was fingerprinted for a juvenile offense, specifying the offense, the method of adjudication, and the disposition ordered."

For a consent calendar case that has been completed and closed, the court may not report any information to the Department of State Police. MCR 3.932(C)(7). In cases on the formal calendar, if the court finds that a juvenile has violated probation by committing a criminal offense, such a finding must be recorded only as a probation violation, not as a finding of guilt or responsibility for the criminal offense. MCR 3.944(E)(2). In addition, the finding must not be reported to the Department of State Police as an adjudication or disposition. *Id.*

In criminal cases, MCL 769.16a requires the clerk of the court entering a disposition of the following offenses to send a summary of the disposition to the Department of State Police:

- a felony;

- a misdemeanor for which the maximum penalty exceeds 92 days' imprisonment;
- a local ordinance for which the maximum possible penalty is 93 days' imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum possible penalty is 93 days' imprisonment;
- a misdemeanor in a case in which the appropriate court was notified that fingerprints were forwarded to the Department of State Police;
- criminal contempt of court for a violation of MCL 600.2950 or 600.2950a; or
- criminal contempt for a violation of a foreign protection order that satisfies the conditions for validity in MCL 600.2950i.

## 25.15 Required Reporting to the Secretary of State

"The court shall prepare and forward to the Secretary of State an abstract of its findings at such times and for such offenses as are required by law." MCR 3.943(E)(6). The clerk of the Family Division is required to keep a full record of every case in which a person is charged with violating the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code. MCL 257.732(1). The county clerk is the clerk of the court for the Family Division and keeps the records and indexes of actions. MCL 600.1007.

The clerk of the court must send an abstract of the court record to the Secretary of State following a finding that a juvenile has committed certain traffic-related offenses.* The abstract must be certified by signature, stamp, or facsimile signature to be true and correct, and it must contain the following information:

*MCL 257.732(15) excludes non-moving violations from the abstracting requirements.

> "(a) The name, address, and date of birth of the person charged or cited.
>
> "(b) The number of the person's operator's or chauffeur's license, if any.
>
> "(c) The date and nature of the violation.
>
> "(d) The type of vehicle driven at the time of the violation . . . .
>
> "(e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.

> "(f) Whether bail was forfeited;
>
> "(g) Any license restriction, suspension, or denial ordered by the court as provided by law.
>
> "(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.
>
> "(i) Other information considered necessary to the Secretary of State." MCL 257.732(3)(a)–(i).

See also MCL 324.80131 (similar requirements for violations of the provisions governing off-road vehicles).

The time requirements for sending the required abstract vary according to the type of offense committed by the juvenile.

**"Drunk driving" offenses that must be abstracted when a charge is dismissed or a juvenile is acquitted.** The clerk must *immediately* forward an abstract of the record for each case charging a violation of MCL 257.625(1) (driving under the influence of liquor and/or controlled substance), MCL 257.625(3) (driving while visibly impaired), MCL 257.625(6) (person under 21 driving with any bodily alcohol content), or MCL 257.625(7) ("drunk driving" offense committed while person less than 16 years old was occupant or passenger), where the charge is dismissed or the juvenile is "acquitted." MCL 257.732(1)(b).

**Offenses that must be abstracted upon conviction.** MCL 257.732(4) requires the clerk to forward an abstract of the court record upon a person's conviction of any of the following offenses or attempt to commit any of the following offenses:

- unlawful driving away of a motor vehicle, MCL 750.413;
- unlawful use of an automobile, without intent to steal, MCL 750.414;
- failure to obey a police or conservation officer's direction to stop, MCL 750.479a;
- felonious driving, MCL 752.191;
- negligent homicide with a motor vehicle, MCL 750.324;
- manslaughter with a motor vehicle, MCL 750.321;
- murder with a motor vehicle, MCL 750.316 (first-degree murder), and MCL 750.317 (second-degree murder);

- minor purchasing or attempting to purchase, consuming or attempting to consume, or possessing or attempting to possess alcoholic liquor, MCL 436.1703, or a local ordinance substantially corresponding to this section; or

- a controlled substance offense listed in MCL 333.7401–333.7461, or MCL 333.17766a.

A "conviction" includes a juvenile court adjudication. See MCL 257.8a.

**Offenses that must be abstracted upon entry of a juvenile disposition.** MCL 712A.2b(d) and MCL 257.732(1)(a) require the court, within 14 days after entry of an order of disposition, to forward an abstract of the court record to the Secretary of State if a juvenile is found within the jurisdiction of the Family Division for violating the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code.

For a case consent calendar case that has been completed and closed, the court may not send an abstract to the Secretary of State. MCR 3.932(C)(7). In cases on the formal calendar, if the court finds that a juvenile has violated probation by committing a criminal offense, such a finding must be recorded only as a probation violation, not as a finding of guilt or responsibility for the criminal offense. MCR 3.944(E)(2). In addition, the finding must not be reported to the Secretary of State as an adjudication or disposition. *Id.*

**Felonies in which a motor vehicle was used.** MCL 257.732(8) requires the clerk of the Family Division to forward an abstract of the court record to the Secretary of State where the offense for which the disposition is ordered is a "felony in which a motor vehicle was used."*

*See Section 5.3 for discussion of what constitutes a "felony in which a motor vehicle was used."

## 25.16 Setting Aside a Juvenile Adjudication

MCR 3.925(F)(1) states that "[t]he setting aside of juvenile adjudications is governed by MCL 712A.18e." Except as stated below, a person adjudicated of not more than one juvenile offense and who has no felony convictions may file an application with the adjudicating court for entry of an order setting aside the adjudication. A person may have only one adjudication set aside under this section. MCL 712A.18e(1). In criminal proceedings, a person convicted of more than one misdemeanor may not have any offense set aside. *People v Grier,* 239 Mich App 521, 522 (2000). See also *People v McCullough,* 221 Mich App 253 (1997) (the trial court erred by setting aside the defendant's misdemeanor convictions for two offenses arising from the same incident).

## A. Offenses That May Not Be Set Aside

MCL 712A.18e(2)(a)–(c) provides that a person shall not apply to have set aside, and the court shall not set aside, any of the following:

- an adjudication of an offense which if committed by an adult would be a felony for which the maximum punishment is life imprisonment;
- an adjudication for an offense which if committed by an adult would be a criminal violation of the Michigan Vehicle Code; or
- a conviction following designated proceedings in the Family Division, but a person may have a conviction following designated proceedings set aside as otherwise provided by law.*

*See Section 25.17, below (setting aside convictions following criminal proceedings).

## B. Procedure for Application

An application to set aside a juvenile adjudication may not be filed until five years following imposition of the disposition for the adjudication, or five years following completion of any term of detention for the adjudication, or when the person becomes 24 years of age, whichever occurs later. MCL 712A.18e(3).

MCL 712A.18e(4)(a)–(g) provide that the application must be signed under oath and contain:

- the applicant's full name and current address;
- a certified record of the adjudication that is to be set aside;
- a statement that the applicant has not been adjudicated of any other juvenile offense;
- a statement that the applicant has not been convicted of any felony offense;
- a statement as to whether the applicant has previously filed an application to set aside this or any other adjudication, and, if so, the disposition of the prior application;
- a statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country;
- a consent to the use of the nonpublic record to be held by the state police.*

*See Section 25.16(G), below.

## C. Submission of Application to State Police

Although the original application is to be filed with the Family Division, MCL 712A.18e(5)–(6) state that the applicant must submit a copy of the application and two sets of fingerprints to the Department of State Police. The Department of State Police then compares the fingerprints to the records of the department, including the nonpublic record, and forwards a set of the fingerprints to the Federal Bureau of Investigation for a comparison to the records of that agency. The Department of State Police then reports its findings, if any, to the court, and the court may not act upon the application until the department reports to the court.

The copy of the application submitted to the Department of State Police must be accompanied by a fee of $25.00 payable to the State of Michigan. MCL 712A.18e(6).

## D. Submission of Application to Attorney General and Prosecuting Attorney

A copy of the application must be served upon the attorney general and, if applicable, upon the office of the prosecuting attorney who prosecuted the offense. MCL 712A.18e(7). The attorney general and the prosecuting attorney must have the opportunity to contest the application. *Id.*

If the adjudication was for an offense that if committed by an adult would be an assaultive crime or "serious misdemeanor," and if the name of a victim* is known to the prosecuting attorney, the prosecuting attorney must give the victim of that offense written notice of the application and forward a copy of the application to the victim pursuant to MCL 780.796a of the Crime Victim's Rights Act. Notice must be sent by first-class mail to the victim's last-known address. The victim has a right to appear at any proceeding concerning the adjudication and to make a written or oral statement. MCL 712A.18e(7).

*See Section 4.3(A) for a definition of "victim."

**"Assaultive crimes."** "Assaultive crime" is defined in MCL 770.9a. MCL 780.796a(2)(a). However, because "life offenses" may not be set aside, only certain "assaultive crimes" are eligible to be set aside.* The following list contains all of the "assaultive crimes" contained in MCL 770.9a(3), **with those "life offenses" that may *not* be set aside in *italics*:**

- felonious assault, MCL 750.82;
- *assault with intent to commit murder, MCL 750.83;*
- assault with intent to do great bodily harm less than murder, MCL 750.84;
- assault with intent to maim, MCL 750.86;
- assault with intent to commit a felony, MCL 750.87;

*Juveniles accused of or charged with "assaultive offenses" must not be diverted from formal court procedures. MCL 722.823(3) and MCL 722.822(a).

- assault with intent to commit unarmed robbery, MCL 750.88;
- *assault with intent to commit armed robbery, MCL 750.89;*
- *first-degree murder, MCL 750.316;*
- *second-degree murder, MCL 750.317;*
- manslaughter, MCL 750.321;
- *kidnapping, MCL 750.349;*
- *prisoner taking another as hostage, MCL 750.349a;*
- *kidnapping a child under age 14, MCL 750.350;*
- mayhem, MCL 750.397;
- *first-degree criminal sexual conduct, MCL 750.520b;*
- *second-degree criminal sexual conduct, MCL 750.520c;*
- *third-degree criminal sexual conduct, MCL 750.520d;*
- fourth-degree criminal sexual conduct, MCL 750.520e;
- *assault with intent to commit criminal sexual conduct, MCL 750.520g;*
- *armed robbery, MCL 750.529;*
- *carjacking, MCL 750.529a; and*
- unarmed robbery, MCL 750.530.

Effective October 1, 2002, 2002 PA 483 expanded the list of "assaultive crimes" in MCL 770.9a. The added offenses are:

- Assault against Family Independence Agency employee causing serious bodily impairment, MCL 750.81c(3).
- Intentional assaultive conduct against pregnant individual with intent to cause miscarriage or death to embryo or fetus, MCL 750.90a.
- Intentional assaultive conduct against pregnant individual causing great bodily harm, serious or aggravated injury, or miscarriage or death to embryo or fetus, MCL 750.90b.
- Attempted murder, MCL 750.91.
- A violation of MCL 750.200 to 750.212a [governing explosives, bombs, and harmful devices].
- Stalking, MCL 750.411h.

- Aggravated stalking, MCL 750.411i.
- A violation of MCL 750.543a to 750.543z [governing terrorist crimes].

**"Serious misdemeanors."** "Serious misdemeanors" are listed in MCL 780.811. However, because criminal traffic offenses may not be set aside, the two criminal traffic offenses included in this list may not be set aside. The following list contains all of the "serious misdemeanors," **with those criminal traffic offenses that may *not* be set aside in *italics*:**

- assault and battery, MCL 750.81;
- aggravated assault, MCL 750.81a;
- illegal entry, MCL 750.115;
- fourth-degree child abuse, MCL 750.136b;
- enticing a child for an immoral purpose, MCL 750.145a;
- discharge of a firearm intentionally aimed at a person, MCL 750.234;
- discharge of a firearm intentionally aimed at a person resulting in injury, MCL 750.235;
- indecent exposure, MCL 750.335a;
- stalking, MCL 750.411h;
- *leaving the scene of a personal-injury accident, MCL 257.617a, resulting in damage to another individual's property or physical injury or death to another individual;*
- *operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual;*
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;
- operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or (3), if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual;
- a violation of a local ordinance substantially corresponding to a violation listed above; and

- a charged felony or serious misdemeanor that is subsequently reduced or pled to a misdemeanor. MCL 780.811(1)(a).

## E. Court Action on the Application

MCL 712A.18e(8) provides that, after the state police report is received by the court, the court may require the filing of affidavits and the taking of such proofs as it considers proper before ruling on the application.

For the offense of unlawfully driving away an automobile or attempted UDAA only, an adjudication must be set aside if the applicant follows all of the requirements of this section. For any other offense, the setting aside of an adjudication is conditional and a privilege, not a right. The court may set aside the adjudication if it determines that the circumstances and behavior of the applicant from the date of the applicant's adjudication to the filing of the application warrant setting aside the adjudication and that setting aside the adjudication is consistent with the public welfare. MCL 712A.18e(9)–(10). See *People v Rosen,* 201 Mich App 621, 622–24 (1993) (to determine whether to set aside a criminal conviction, a court should balance the circumstances and behavior of the offender and the public welfare; the nature of offense alone does not preclude setting aside the conviction).

## F. Effect of Order

If the court grants the application and sets aside the sole juvenile adjudication of the applicant, the applicant, for purposes of the law, shall be considered never to have been adjudicated for the offense, except:

> "(a) The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of an adjudication that is set aside.
>
> "(b) This section does not affect the right of the applicant to rely upon the adjudication to bar subsequent proceedings for the same offense.
>
> "(c) This section does not affect the right of a victim of an offense to prosecute or defend a civil action for damages.
>
> "(d) This section does not create a right to commence an action for damages for detention under the disposition that the applicant served before the adjudication is set aside pursuant to this section." MCL 712A.18e(11)(a)–(d).

## G. Access to Records of Adjudications That Have Been Set Aside

MCL 712A.18e(12)–(15) deal with the maintenance of and access to the nonpublic records of the state police. If the court grants the application and sets aside the adjudication, the court must expunge its own files and send a copy of the order to the arresting agency and the state police. MCL 712A.18e(12).

The state police must maintain a nonpublic record of any order setting aside an adjudication and the record of the arrest, fingerprints, adjudication, and disposition of the applicant in the case to which the order applies. This nonpublic record is available only to:

- a court of competent jurisdiction;
- an agency of the judicial branch of state government;
- a law enforcement agency;
- a prosecuting attorney;
- the Attorney General; or
- the Governor. MCL 712A.18e(13).

The nonpublic record may be made available to these persons and entities upon request but only for the following reasons:

> "(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.
>
> "(b) Consideration by a law enforcement agency if a person whose adjudication has been set aside applies for employment with the law enforcement agency.
>
> "(c) To show that a person who has filed an application to set aside an adjudication has previously had an adjudication set aside under this section.
>
> "(d) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.*
>
> "(e) Consideration by the governor, if a person whose adjudication has been set aside applies for a pardon for another offense." MCL 712A.18e(13)(a)–(e).

*See *People v Smith,* 437 Mich 293 (1991), discussed in Section 25.7, above.

The applicant has the right to secure a copy of the nonpublic record upon payment of a fee to the state police in the same manner as the fee prescribed

in MCL 15.234 of the Freedom of Information Act. However, the nonpublic record maintained by the state police is exempt from disclosure under the Freedom of Information Act. MCL 712A.18e(14)–(15).

## 25.17 Setting Aside a Criminal Conviction

MCL 712A.18e(2)(c) states that a conviction following designated proceedings in the Family Division shall not be set aside. However, this does not prevent a person convicted after designated proceedings from seeking to have the conviction set aside as otherwise provided by law. MCR 3.925(F)(2) states that the court may only set aside a conviction pursuant to MCL 780.621, et seq. In addition, a conviction following an "automatic" or "traditional waiver" proceeding may be set aside as provided in MCL 780.621.

Subject to the exceptions listed below, MCL 780.621(1) allows a person who is convicted of not more than one offense to file an application with the convicting court for entry of an order setting aside that conviction. A person may have only one conviction set aside. MCL 780.624. The term "offense" includes both misdemeanors and felonies. Thus, a person convicted of more than one misdemeanor may not have any offense set aside. *People v Grier,* 239 Mich App 521, 522 (2000). See also *People v McCullough,* 221 Mich App 253 (1997) (the trial court erred by setting aside the defendant's misdemeanor convictions for two offenses arising from the same incident).

A person shall not apply to have set aside, and a judge shall not set aside, any of the following:

- a conviction of a felony for which the maximum punishment is life imprisonment, or an attempt to commit such a felony;
- a conviction for a violation or attempted violation of any of the following offenses:
  - — second-degree criminal sexual conduct, MCL 750.520c;
  - — third-degree criminal sexual conduct, MCL 750.520d;
  - — assault with intent to commit criminal sexual conduct, MCL 750.520g;
- a conviction for a traffic offense. MCL 780.621(2).

MCL 780.621 was amended, effective April 1, 1997, to preclude setting aside convictions of an attempt to commit a life offense, second-, and third-degree criminal sexual conduct, and assault with intent to commit criminal sexual conduct. See 1996 PA 573. The Michigan Court of Appeals has held that the amendment must be given retroactive effect. *People v Link,* 225 Mich App 211, 214–18 (1997).

## A. Procedure for Application

An application must not be filed until the expiration of five years following imposition of the sentence for the conviction the applicant seeks to set aside, or five years following completion of any term of imprisonment for that conviction, whichever occurs later. MCL 780.621(3).

The application is invalid unless it contains the following information and is signed under oath by the person whose conviction is to be set aside:

> "(a) The full name and current address of the applicant.
>
> "(b) A certified record of the conviction that is to be set aside.
>
> "(c) A statement that the applicant has not been convicted of an offense other than the one sought to be set aside as a result of this application.
>
> "(d) A statement as to whether the applicant has previously filed an application to set aside this or any other conviction and, if so, the disposition of the application.
>
> "(e) A statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country.
>
> "(f) A consent to the use of the nonpublic record created under [MCL 780.623] to the extent authorized by [MCL 780.623]."* MCL 780.621(4)(a)–(f).

*See Section 25.17(F), below.

## B. Submission of Application to State Police

The applicant must submit a copy of the application and two complete sets of fingerprints to the Department of State Police. The Department of State Police then compares the fingerprints to the records of the department, including the nonpublic record, and forwards a set of the fingerprints to the Federal Bureau of Investigation for a comparison to the records of that agency. The Department of State Police then reports its findings, if any, to the court, and the court may not act upon the application until the department reports to the court. MCL 780.621(5).

The copy of the application submitted to the Department of State Police must be accompanied by a fee of $50.00 payable to the State of Michigan. MCL 780.621(6).

## C. Submission of Application to the Attorney General and Prosecuting Attorney

*See Section 25.16(D), above, for lists of the "assaultive crimes" and "serious misdemeanors." See Section 4.3(A) for the definition of "victim."

A copy of the application must be served upon the attorney general and upon the office of the prosecuting attorney who prosecuted the crime. The attorney general and the prosecuting attorney must have the opportunity to contest the application. If the conviction was for an "assaultive crime" or "serious misdemeanor," and if the name of the victim* is known to the prosecuting attorney, the prosecuting attorney must give the victim of that offense written notice of the application and forward a copy of the application to the victim pursuant to MCL 780.772a and MCL 780.827a of the Crime Victim's Rights Act. Notice must be by first-class mail to the victim's last known address. The victim has a right to appear at any proceeding concerning the conviction and to make a written or oral statement. MCL 780.621(7).

## D. Court Action on the Application

MCL 780.621(8) provides that upon the hearing of the application the court may require the filing of affidavits and the taking of proofs as it considers proper. If the court determines that the circumstances and behavior of the applicant from the date of the applicant's conviction to the filing of the application warrant setting aside the conviction and that setting aside the conviction is consistent with the public welfare, the court may enter an order setting aside the conviction. The setting aside of a conviction under this act is a privilege and conditional and is not a right. MCL 780.621(9). See *People v Rosen,* 201 Mich App 621, 622–24 (1993) (to determine whether to set aside a conviction, a court should balance the circumstances and behavior of the offender and the public welfare; the nature of offense alone does not preclude setting aside the conviction).

## E. Effect of Order

MCL 780.622(1) states that, after entry of an order setting aside a conviction, the applicant shall be considered not to have been previously convicted. However:

> "(2) The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside.
>
> "(3) If the conviction set aside pursuant to this act is for a listed offense [under] the sex offenders registration act,* the applicant is considered to have been convicted of that offense for purposes of the sex offenders registration act.

*See Section 25.18(A), below, for these "listed offenses."

> "(4) This act does not affect the right of the applicant to rely upon the conviction to bar subsequent proceedings for the same offense.
>
> "(5) This act does not affect the right of a victim of a crime to prosecute or defend a civil action for damages.
>
> "(6) This act does not create a right to commence an action for damages for incarceration under the sentence that the applicant served before the conviction is set aside pursuant to this act." MCL 780.622(2)–(6).

## F. Access to Records of Convictions That Have Been Set Aside

MCL 780.623 allows the state police to retain a nonpublic record of the order setting aside the conviction and a record of the arrest, fingerprints, conviction, and sentence of the applicant in the case to which the order applies. This nonpublic record shall be made available upon request but only to:

- a court of competent jurisdiction;
- an agency of the judicial branch of state government;
- a law enforcement agency;
- a prosecuting attorney;
- the Attorney General; or
- the Governor.

The nonpublic record may be made available to these persons and entities only for the following reasons:

> "(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.
>
> "(b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside pursuant to this act.
>
> "(c) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.*
>
> "(d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.

*See *People v Smith,* 437 Mich 293 (1991), discussed in Section 25.7, above.

> "(e) Consideration by a law enforcement agency if a person whose conviction has been set aside applies for employment with the law enforcement agency.
>
> "(f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act has violated that act, or for use in a prosecution for violating that act." MCL 780.623(2)(a)–(f).

A copy of the nonpublic record must also be provided to the person whose conviction is set aside upon payment of a fee to the state police in the same manner as the fee prescribed in MCL 15.234 of the Freedom of Information Act. MCL 780.623(3). However, the nonpublic record is exempt from disclosure under the Freedom of Information Act. MCL 780.623(4).

## 25.18 Recordkeeping Requirements of the Sex Offenders Registration Act

MCL 712A.18(13) states that if the Family Division has entered an order of disposition for a "listed offense," as defined in MCL 28.722, or an attempt or conspiracy to commit any "listed offense," the court or the Family Independence Agency must register the juvenile or accept the juvenile's registration as provided in the Sex Offenders Registration Act (SORA or "the act"), MCL 28.721 et seq. Juveniles whose cases have been designated for criminal trial in the Family Division and juveniles waived to the Criminal Division must also comply with the act.

### A. Who Must Register?

*For registered individuals who move outside Michigan, see Section 25.18(C), below.

An individual who is domiciled, residing, working, or attending school for 14 or more consecutive days (or 30 or more total days in a calendar year) in Michigan is required to register under Michigan's Act if any of the following apply:*

> (1) The individual is convicted of a "listed offense" after October 1, 1995. MCL 28.723(1)(a).
>
> (2) The individual is convicted on or after September 1, 1999 of an offense added on September 1, 1999 to the definition of "listed offense." MCL 28.723(2)(a).
>
> (3) The individual is required to be registered as a sex offender in another state or country regardless of when the conviction was entered. MCL 28.724(6)(c).

(4) The individual is required to register or otherwise be identified as a sex or child offender or predator under a comparable statute of that state. MCL 28.723(1)(d).

**Note:** For convictions on or before October 1, 1995, see MCL 28.723(1)(b)–(c). For convictions before September 1, 1999, of offenses added on September 1, 1999, to the definition of "listed offense," see MCL 28.723(2)(b)–(d).

**"Convicted."** Being "convicted" means any of the following under MCL 28.722(a)(i)–(iv):

- Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses, including but not limited to, a tribal or military court, and including a conviction subsequently set aside pursuant to MCL 780.621–780.624. See also MCL 780.622(3) (inability to set aside convictions for listed offenses for purposes of SORA).

- Being assigned to youthful trainee status pursuant to MCL 762.12–762.15. See *People v Rahilly*, 247 Mich App 108 (2001) (HYTA defendants must register in accordance with Sex Offenders Registration Act, even following discharge from youthful trainee status).

- Having an order of disposition entered pursuant to MCL 712A.18 that is open to the general public under MCL 712A.28 (records of cases).

- Having an order of disposition or other adjudication in a juvenile matter in another state or country.

**Note:** Whether juvenile delinquents are required to comply with the Act's registration requirements *after* an order of disposition has been successfully set aside is unclear. The foregoing definition of "convicted" does not contain language requiring compliance with the Act in such circumstances, nor does the Juvenile Code's set-aside provisions under MCL 712A.18e. However, the Code of Criminal Procedure's set-aside provisions do contain such a provision: "If the conviction set aside . . . is for a listed offense . . . the applicant is considered to have been convicted of that offense for purposes of [the Act]." MCL 780.622(3). For information on the applicability of the Code of Criminal Procedure to juvenile offenders and proceedings, see Section 1.3(B).

**"Listed Offense."** A "listed offense" means any of the following under MCL 28.722(e):

- accosting, enticing or soliciting a child for immoral purposes, MCL 750.145a;
- accosting, enticing or soliciting a child for immoral purposes, second offense, MCL 750.145b;
- child sexually abusive activity, MCL 750.145c;
- crimes against nature or sodomy, MCL 750.158, if a victim is less than 18 years of age;*

*Added as "listed offense" on September 1, 1999.

- a third or subsequent violation of any combination of the following:
  - — disorderly person (indecent or obscene conduct), MCL 750.167(1)(f);
  - — indecent exposure, MCL 750.335a;
  - — local ordinances substantially corresponding to MCL 750.167(1)(f) (disorderly persons), or MCL 750.335a (indecent exposure);
- gross indecency between males, MCL 750.338, if a victim is less than 18 years of age (not applicable to juvenile dispositions or adjudications);*

*Added as "listed offense" on September 1, 1999.

- gross indecency between females, MCL 750.338a, if a victim is less than 18 years of age (not applicable to juvenile dispositions or adjudications);*

*Added as "listed offense" on September 1, 1999.

- gross indecency between males and females, MCL 750.338b, if a victim is less than 18 years of age (not applicable to juvenile dispositions or adjudications);*

*Added as "listed offense" on September 1, 1999.

- kidnapping, MCL 750.349, if a victim is less than 18 years of age;*
- kidnapping child under 14, MCL 750.350;*

*Added as "listed offense" on September 1, 1999.

- soliciting and accosting, MCL 750.448, if a victim is less than 18 years of age;*
- pandering, MCL 750.455;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e;

- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- a violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against a person less than 18 years of age;*
- an offense committed by a person who was, at the time of the offense, a sexually delinquent person, as defined in MCL 750.10a;*
- an attempt or conspiracy to commit any of the foregoing offenses; and
- an offense substantially similar to any of the foregoing offenses under a law of the United States, any state, any country, or under tribal or military law.*

*Added as "listed offense" on September 1, 1999.

*Added as "listed offense" on September 1, 1999.

*Offenses under tribal and military law were added as "listed offenses" on September 1, 1999.

The foregoing asterisked (*) offenses were added to the definition of "listed offense" by the Legislature by 1999 PA 85, effective September 1, 1999. Under MCL 28.723(2)(a)–(d), an individual convicted of a 1999 "listed offense" must register for that offense if one of the following applies:

> (a) The individual is convicted of that offense on or after September 1, 1999.
>
> (b) On or after September 1, 1999, the individual is on (or placed on) probation or parole, committed to jail, committed to the jurisdiction of the Department of Corrections, under the jurisdiction of Family Division of Circuit Court, or committed to the Family Independence Agency for that offense.
>
> (c) On September 1, 1999, the individual is on probation or parole for that offense which has been transferred to Michigan, or the individual's probation or parole for that offense is transferred to Michigan after September 1, 1999.
>
> (d) On September 1, 1999, in another state or country, the individual is on probation or parole, committed to jail, committed to the jurisidiction of the Department of Corrections or a similar type of state agency, under the jurisdiction of a court that handles matters similar to those handled by Michigan's Family Division of Circuit Court, or committed to an agency with the same authority as Michigan's Family Independence Agency for that offense.

In *People v Meyers,* 2002 WL 563359 (Mich App, April 16, 2002), the defendant pleaded guilty of violating MCL 750.145d(1)(b), which proscribes using the internet to communicate with a person for the purpose of attempting to commit conduct proscribed under MCL 750.145a. The defendant argued that he was not required to register under SORA because

MCL 750.145d is not a "listed offense." The Court of Appeals held that the defendant was required to register under SORA. The Court first concluded that although MCL 750.145d prohibits persons from attempting to commit a violation of MCL 750.145a, a "listed offense," the defendant in this case did not violate MCL 750.145a, which does not itself prohibit attempts to accost a child. Nonetheless, MCL 28.722(e)(xii) includes as a "listed offense" an attempt or conspiracy to commit a "listed offense." The Court concluded that this provision, in conjunction with MCL 28.722(e)(i), MCL 750.145d, and MCL 750.145a, required the defendant to register under SORA. The Court also concluded that whether a case falls under SORA's catch-all provision, MCL 28.722(e)(x), is to be determined on a case-by-case basis. To determine whether the catch-all provision applies, a court should analyze the underlying facts of the case, rather than the statute violated, to determine whether the violation was, "by its nature, a sexual offense."

**"Residence."** "Residence" means "that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act. This section shall not be construed to affect existing judicial interpretation of the term residence." MCL 28.722(g).

**"Student."** "Student" means "an individual enrolled on a full- or part-time basis in a public or private educational institution, including but not limited to a secondary school, trade school, professional institution, or institution of higher education." MCL 28.722(h).

## B. Initial Registration and Duties

**Individuals convicted in Michigan.** Under MCL 28.724(5), an individual convicted of a "listed offense" in Michigan after October 1, 1995, who is domiciled, residing, working, or attending school for 14 or more consecutive days (or 30 or more total days in a calendar year) in Michigan must register *before* any of the following occurs:

- sentencing;
- entry of an order of disposition; or
- assignment to youthful trainee status.

**Note:** For registration procedures regarding an individual convicted of a listed offense on or before October 1, 1995, see MCL 28.724(2)(1)–(3). For registration procedures regarding an individual convicted on or before September 1, 1999, of offenses that were added on September 1, 1999, to the definition of listed offense, see MCL 28.724(4).

The probation officer or the court must provide the registration form, explain the duty to register, verify the individual's address, provide notice of address changes, and accept the completed form for processing under MCL 28.726. MCL 28.724(5). Furthermore, the court shall *not* impose sentence, enter an order of disposition, or assign an individual to youthful trainee status until it determines that the individual's registration was forwarded to the state police. *Id*. The officer, court, or agency registering an individual must forward the registration or notification to the state police by the law enforcement information network (LEIN) within three business days after registration or notification. MCL 28.726(2).

> **Note:** If an individual is required to be registered under the Act and is placed on probation, the probation order must include a condition that the individual comply with the Act. MCL 771.3(1)(g).

**Individuals convicted (or registered) out of state.** MCL 28.724(6)(a)–(c) require the following individuals to register with the local law enforcement agency, sheriff's department, or state police **within 14 days** after becoming domiciled, temporarily residing, working, or being a student in Michigan for 14 or more consecutive days (or 30 or more total days in a calendar year):

> (a) an individual convicted in another state or country after October 1, 1995, of a listed offense as defined before September 1, 1999;
>
> (b) an individual convicted in another state or country of an offense added on September 1, 1999, to the definition of listed offenses; or
>
> (c) an individual required to be registered as a sex offender in another state or country regardless of when the conviction was entered.

## C. Post-Registration Change of Status

**In-state changes.** MCL 28.725(1) requires an individual who is required to be registered under the Act to notify local law enforcement, the sheriff's department having jurisdiction where the individual's new residence or domicile is located, or the state police **within 10 days** after any of the following occur:

- The individual changes his or her residence, domicile, or place of work or education.
- The individual is paroled.
- Final release of the individual from Department of Corrections jurisdiction.

MCL 28.725(2) requires the Department of Corrections to notify local law enforcement, the sheriff's department having jurisdiction over the area to which the individual is transferred, or the state police **within 10 days** after either of the following occur:

- The individual is transferred to a community residential program.
- The individual is transferred into a minimum custody correctional facility of any kind, including a correctional camp or work camp.

For registration duties and procedures for an individual convicted of a listed offense on or before October 1, 1995, see MCL 28.724(2)–(3).

For registration duties and procedures for an individual convicted on or before September 1, 1999, of an offense that was added on September 1, 1999, see MCL 28.724(4)(a)–(g).

**Out-of-state changes.** An individual required to be registered under the Act who changes domicile or residence to another state must notify the department of state police *by form* prescribed by the state police **not later than 10 days** before changing domicile or residence to that other state. The individual must indicate the new state and, if known, the new address. The state police must update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. MCL 28.725(3).

If an individual required to be registered under the Act is transferred from a state correctional facility to any correctional facility or probation or parole in another state, or if the individual's probation or parole in transferred to another state, the department of corrections must **promptly notify** the department and the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. MCL 28.725(4). The state police must update the registration and compilation databases. *Id*.

**"Campus reporting."** Effective October 1, 2002, 2002 PA 542 amended various provisions of the Sex Offenders Registration Act (SORA) to require individuals who are "required to be registered" and who also become a student, full- or part-time employee, contract provider, or volunteer with an institution of higher education to *report* their status in person to an applicable law enforcement agency having jurisdiction over that particular campus. These "campus reporting" amendments are reflected below.

Effective October 1, 2002, 2002 PA 542 amended MCL 28.725(1)(a) to include the requirement that an individual must notify law enforcement within 10 days of "any change required to be reported under section 4a [MCL 28.724a, governing campus reporting]."

Under MCL 28.724a(1)(a)-(f), an individual required to be registered under the SORA who is **not a resident** of this state must report his or her status in person to the local law enforcement agency or sheriff's department having jurisdiction over a campus of an institution of higher education, or to a State Police post nearest to that campus, if any of the following occur:

> "(a) Regardless of whether he or she is financially compensated or receives any governmental or educational benefit, the individual is or becomes a full- or part-time employee, contractual provider, or volunteer with that institution of higher education and his or her position will require that he or she be present on that campus for 14 or more consecutive days or 30 or more total days in a calendar year,
>
> "(b) The individual is or becomes an employee of a contractual provider described in subsection (a) and his or her position will require that he or she be present on that campus for 14 or more consecutive days or 30 or more total days in a calendar year.
>
> "(c) The status described in subdivision (a) or (b) is discontinued.
>
> "(d) The individual changes the campus on which he or she is an employee, a contractual provider, an employee or a contractual provider, or a volunteer as described in subdivision (a) or (b).
>
> "(e) The individual is or enrolls as a student with that institution of higher education or the individual discontinues that enrollment.
>
> "(f) As part of his or her course of studies at an institution of higher education in this state, the individual is present at any other location in this state, another state, a territory or possession of the United States, or another country for 14 or more consecutive days or 30 or more total days in a calendar year, or the individual discontinues his or her studies at that location."

Under MCL 28.724a(2), an individual required to be registered under the SORA who is **a resident** of this state must report his or her status in person to the local law enforcement agency or sheriff's department having jurisdiction where his or her new residence or domicile is located, or the State Police post nearest to the individual's new residence or domicile, if any of the events described in MCL 28.724a(1) occur.

Under MCL 28.724a(3)(a)-(c), an individual required to report under MCL 28.724a(1)-(2) must make his or her report within the following time-frames:

- Not later than January 15, 2003, if the individual is registered under SORA before October 1, 2002.
- On the date he or she is required to register under SORA, if the individual is an employee, a contractual provider, an employee of a contractual provider, a volunteer on that campus, or a student on that campus on October 1, 2002.
- Except as provided in the two preceding subparagraphs, within ten days after the individual becomes an employee, a contractual provider, an employee of a contractual provider, or a volunteer on the campus, or discontinues that status, or changes location, or if he or she enrolls or disontinues his or her enrollment as a student on that campus including study in this state or another state, a territory or possession of the United States or another country.

Under MCL 28.724a(5), the applicable law enforcement agency must require the individual who reports to present written documentation substantiating all of the following:

- Employment status.
- Contractual relationship.
- Volunteer status.
- Student status.

Under MCL 28.724a(5), such "written documentation" may include, but need not be limited to, any of the following:

- A W-2 form, pay stub, or written statement by employer.
- A contract.
- A student identification card or student transcript.

An individual required to report under MCL 28.724a must also verify his or her registration quarterly or yearly, as required under MCL 28.725a(4)-(b). MCL 28.724a(4).

Under MCL 28.722(c)(i)-(ii), an "institution of higher education" means one or more of the following:

- A public or private community college, college, or university.

- A public or private trade, vocational, or occupational school.

## D. The "Registration"

**Form and contents.** A "registration" under the Act must be made on a form provided by the state police. MCL 28.727(1). The registration must contain the following information under MCL 28.727(1)(a)–(e):

- name;
- social security number;
- date of birth;
- address;
- a brief summary of the individual's convictions for listed offenses, regardless of the date of conviction, including where the offense occurred and the original charge;
- a complete physical description;
- a photograph; and
- fingerprints, if not already on file with the Department of State Police. MCL 28.727(1).

Effective October 1, 2002, 2002 PA 542 added the following item to be contained on a SORA registration:

> "Information that is required to be reported under section 4a [MCL 28.724a, governing campus reporting requirements]." MCL 28.727(1)(f).

The form used for registration or verification must contain a written statement explaining the individual's duty to provide notice of a change of address, as required under MCL 28.725 and MCL 28.725a.* MCL 28.727(3).

*See Section 25.18(F) for more information on an individual's duty to notify.

The registration may contain the following additional information: (1) blood type, and (2) whether a DNA identification profile* is available for the individual. MCL 28.727(2).

*See Section 25.19, below.

An individual's duties. An individual must sign the registration, notice, and verification.* MCL 28.727(4). Additionally, the individual must not knowingly provide false or misleading information concerning a registration, notice, or verification. MCL 28.727(6). The registration, notice, and verification must be forwarded to the state police, regardless of whether the individual signs the registration, notice, or verification. MCL 28.727(4).

*See Section 25.18(F) for more information regarding the verification process.

**Agency duties.** The officer, court, or an employee of the agency registering the individual or receiving or accepting a registration must sign the registration form. MCL 28.727(5).

## E. Length of Registration Period

The Act delineates three time periods during which an individual must comply with the Act's registration requirements:

- lifetime.
- 25 years.
- 10 years.

**Lifetime registration.** Under MCL 28.725(7), individuals must comply with the Act's registration requirements for life if convicted of any of the following offenses, or a substantially similar offense under a law of the United States, any state or country or a tribal or military court:

- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520c(1)(a);
- kidnapping, if the victim is less than 18 years of age, MCL 750.349;
- kidnapping child under 14 years of age, MCL 750.350;
- child sexually abusive activity, MCL 750.145c(2)–(3);
- attempt or conspiracy to commit any of the immediately foregoing offenses; or
- a second or subsequent "listed offense"* after October 1, 1995, regardless of when any earlier listed offense was committed.

*See Section 25.18(A) for a definition of "listed offense."

**Note:** Under this subparagraph, a sex offender does not have to register for life if the first or second listed offense is for a conviction on or before September 1, 1999, for an offense that was added on September 1, 1999, to the definition of listed offense, unless convicted of a subsequent listed offense after September 1, 1999. MCL 28.725(7)(g).

**10- or 25-year registration.** Under MCL 28.725(6), individuals must comply with the Act's registration requirements for 25 years after the date of the initial registration if convicted of any listed offense other than an offense detailed in the foregoing subsection. However, if incarcerated in a state correctional facility, the individual must comply with the Act's

registration requirements for 10 years after the release from the facility, or 25 years from the date of initial registration, whichever is longer.

## F. Yearly or Quarterly Verification of Domicile or Residence

Under MCL 28.725a(4), individuals must, after initial registration,* verify their domicile or residence either yearly or quarterly by reporting **in person** to any of the following law enforcement agencies:

*See Section 25.18(B), for initial registration requirements.

- a local law enforcement agency;
- the sheriff's department having jurisdiction where the individual resides or is domiciled; or
- The Department of State Police post in or nearest to the individual's county of residence or domicile.

An officer or authorized employee of the law enforcement agency, sheriff's department, or state police post must verify the individual's residence or domicile, sign and date the verification form, give a copy of the signed form to the individual (showing the date of verification), forward verification information to the department by the law enforcement information network (LEIN), and revise the data bases to indicate verification in the compilation. MCL 28.725a(5).

An individual required to be registered under the Act must maintain a valid operator's or chauffeur's license issued under the Michigan Vehicle Code, MCL 257.1 to 257.923, or an official state personal identification card issued under MCL 28.291 to 28.300, with the individual's current address. MCL 28.725a(6). The license or card may be used as proof of domicile or residence under MCL 28.725a. MCL 28.725a(6). An individual may also be required to produce another document bearing the individual's name and address, including but not limited to voter registration or a utility or other bill, or other satisfactory proof of domicile or residence. *Id*.

Effective October 1, 2002, 2002 PA 542 amended MCL 28.725a(5) to require law enforcement officers to verify not only the registered individual's residence and domicile but also "any information required to be reported under section 4a [MCL 28.724a, governing campus reporting]."

**Yearly verification ("misdemeanor listed offenses").** An individual who is not incarcerated and who registered for one or more "misdemeanor listed offenses" after January 15, 2000,* must verify his or her domicile or residence yearly in person, no earlier than January 1 and no later than January 15, at the local law enforcement agency, sheriff's department, or state police post. MCL 28.725a(4)(a).

*This includes individuals who had initial verifications on or before January 15, 2000. MCL 28.725a(4).

If an individual fails to report as required under MCL 28.725a(4)(a), the state police must notify the local law enforcement agency, and an

appearance ticket may be issued, as provided in MCL 764.9a to 764.9g. MCL 28.725a(8).

Under MCL 28.725a(4)(a), "misdemeanor listed offenses" are the following:

- accosting, enticing or soliciting a child for immoral purposes, MCL 750.145a;
- possession of child sexually abusive material, MCL 750.145c(4);
- disorderly person (indecent or obscene conduct), MCL 750.167(1)(f);
- soliciting and accosting, MCL 750.448;
- indecent exposure (other than violation committed by person who was, at the time, a sexually delinquent person, as defined in MCL 750.10a), MCL 750.335a;
- a local ordinance of a municipality substantially corresponding to any of the immediately foregoing crimes;
- a law of this state or local ordinance of a municipality that by its nature constitutes a sexual offense against an individual less than 18 years old if the violation is not specifically designated a felony and is punishable by imprisonment for one year or less;
- attempt or conspiracy to commit any of the immediately foregoing offenses; or
- an offense substantially similar to any of the immediately foregoing offenses under a law of the United States, any state, or any country, or under tribal or military law.

Effective October 1, 2002, 2002 PA 542 amended the definition of "misdemeanor listed offense" under MCL 28.725a(4)(a) to include the following offense:

- Accosting, enticing or soliciting a child under 16 for immoral purpose if committed before June 1, 2002, MCL 750.145a.

**Note:** This statutory change was made to incorporate the Legislature's redesignation of MCL 750.145a from a misdemeanor to a felony, effective June 1, 2002. 2002 PA 45.

**Quarterly verification ("felony listed offenses").** An individual who is not incarcerated and who is registered for one or more "felony listed offenses" after January 15, 2000,* must verify his or her domicile or residence quarterly in person, no earlier than the first day and no later than the fifteenth day of each April, July, October, and January, at the local law enforcement agency, sheriff's department, or state police post. MCL 28.725a(4)(b).

*This includes individuals who had initial verifications on or before January 15, 2000. MCL 28.725a(4).

If an individual fails to report as required under MCL 28.725a(4)(b), the state police must notify the local law enforcement agency, and an appearance ticket may be issued, as provided in MCL 764.9a to 764.9g. MCL 28.725a(8).

Under MCL 28.725a(4)(b), "felony listed offenses" are the following:

- accosting, enticing or soliciting a child for immoral purposes, second offense, MCL 750.145b;
- child sexually abusive activity, MCL 750.145c(2)–(3);
- kidnapping, MCL 750.349;
- kidnapping child under 14, MCL 750.350;
- pandering, MCL 750.455;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e;
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- indecent exposure (if committed by a person who was, at the time of the offense, a sexually delinquent person as defined in MCL 750.10a), MCL 750.335a;
- a law of this state that by its nature constitutes a sexual offense against an individual less than 18 years old if the violation is specifically designated a felony and is punishable by imprisonment for more than one year;
- attempt or conspiracy to commit any of the immediately foregoing offenses; or
- an offense substantially similar to any of the immediately foregoing offenses under a law of the United States, any state, any country, or under tribal or military law.

Effective October 1, 2002, 2002 PA 542 amended the definition of "felony listed offense" under MCL 28.725a(4)(b) to include the following offense:

- Accosting, enticing or soliciting a child under 16 for immoral purpose if committed on or after June 1, 2002, MCL 750.145a.

**Note:** This statutory change was made to incorporate the Legislature's redesignation of MCL 750.145a from a misdemeanor to a felony, effective June 1, 2002. 2002 PA 45.

## G. Public Notification and the Computerized Databases

The state police must maintain two computerized databases of registrations and notices, one containing information for private use by law enforcement agencies, and one containing information for public use, indexed by zip code. MCL 28.728(1)–(2). Under MCL 28.728(3)(a), the computerized compilation intended for public notification must contain the following information for each individual:

- name and any aliases;
- address;
- physical description;
- birthdate; and
- listed offense of which the individual is convicted.

Effective October 1, 2002, 2002 PA 542 amended MCL 28.728(3)(b) to require additional information that must be contained within the computerized compilation. Thus, the name and campus location of each institution of higher education to which the individual is required to report under MCL 28.724a [governing campus reporting] must also be contained in the compilation.

**Public inspection at law enforcement agencies during regular business hours.** A state police post, local law enforcement agency, or sheriff's department must make the information from the computerized compilation, described in MCL 28.728(2), available for public inspection during regular business hours for the zip code areas located in whole or in part in its jurisdiction. MCL 28.730(2). These agencies may make this information available to the public through electronic, computerized, or other accessible means. MCL 28.730(3).

**Public inspection via the Internet.** Michigan's sex offender registrations may be accessed through the world wide web at www.mipsor.state.mi.us (Michigan Public Sex Offender Registration) or through the Michigan State Police website at www.msp.state.mi.us.* The on-line sex offender registrations can be searched by the sex offender's name, age, and 5-digit zip code. No information concerning victims is listed in the registrations or on the websites. The following sex offender information is listed on Michigan's Public Sex Offender Registration website: name, sex, race, date of birth, height, weight, hair color, eye color, address (including city, state, and zip code), citation for "listed offense," and title of "listed offense."

*This website may also be accessed through many local law enforcement agency websites.

## H. Juvenile Offenders Exempt From Public Notification Requirements

Although juvenile offenders not tried as adults are subject to the same *registration* requirements as adult offenders, they are exempted from the Act's *public notification* requirements and from having their registrations placed in the state police's public database. See MCL 28.728(2) and *In re Ayres*, 239 Mich App 8, 12 (1999). However, this exemption does not apply to juvenile dispositions for either first-degree criminal sexual conduct, MCL 750.520b, or second-degree criminal sexual conduct, MCL 750.520c, *after the juvenile offender becomes 18 years of age*. Nor does it apply to juvenile offenders convicted under "automatic" or "traditional" waivers or by "case designation" methods. MCL 28.728(2) provides in pertinent part:

> "The department [of state police] shall maintain a computerized data base separate from that described in subsection (1) to implement section 10(2) and (3) [MCL 28.730(2)–(3)]. The data base shall consist of a compilation of individuals registered under this act, but except as provided in this subsection, *shall not include any individual registered solely because he or she had 1 or more dispositions for a listed offense entered under . . . MCL 712A.18, in a case that was not designated as a case in which the individual was to be tried in the same manner as an adult under . . . MCL 712.2d. The exclusion for juvenile dispositions does not apply to a disposition for a violation of [MCL 750.520b (CSC I) or MCL 750.520c (CSC II)], after the individual becomes 18 years of age*." [Emphasis added.]

## I. Confidentiality of Registration and Criminal Penalties for Disclosure of Non-Public Information

Except as otherwise provided in the Act, a registration is confidential and shall not be open to inspection except for law enforcement purposes. MCL 28.730(1). Additionally, the registration, and included materials and

information, are exempt from disclosure under section 13 of the Freedom of Information Act, MCL 15.243. *Id*.

Effective October 1, 2002, 2002 PA 542 amended MCL 28.730(1) to also protect as confidential any "report under section 4a [MCL 28.724a, governing campus reporting]" in addition to the registration.

An individual other than the registrant who divulges, uses, or publishes nonpublic information concerning the registration in violation of the Act is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a maximum $500.00 fine, or both. MCL 28.730(4). Additionally, the registrant whose registration is revealed has a civil cause of action against the responsible party for treble damages. MCL 28.730(5).

Effective October 1, 2002, 2002 PA 542 amended the maximum penalties for an individual who violates MCL 28.730(4) (divulging, using, or publishing nonpublic information concerning registrations in violation of SORA) from 90 days and/or $500.00 to **93 days and/or $1,000.00**.

## J. National Reporting of Michigan Registrations

Under MCL 28.727(8), the state police must *promptly* provide registration, notice, and verification information to the Federal Bureau of Investigation (FBI), and also to local law enforcement agencies and agencies of other states requiring the information, as provided by law. The information sent to the FBI is entered into a national database, known as the National Sex Offender Registry (NSOR), which was created through the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, 42 USC 14072.

Effective October 1, 2002, 2002 PA 542 added the following agencies that must receive SORA's registration, notice, and verification information under MCL 28.727(8):

- Sheriff's departments; and
- State Police posts.

The Lychner Act obligates the FBI to do the following: (1) to track the whereabouts and movement of each person convicted of a criminal offense against a minor victim or a sexually violent offense, or a person who is a sexually violent predator, 42 USC 14072(b)(1)–(3), and (2) to register and verify the addresses of sex offenders who reside in states that do not have "minimally sufficient sexual offender registration program." 42 USC 14072(c). NSOR does contain registrations from states having "minimally sufficient" registration programs. While the Pam Lychner Act *requires* NSOR to contain registrations for states not having "minimally sufficient" programs, it does not *preclude* participation from states with "minimally sufficient" programs. Despite having a "minimally sufficient" program,

Michigan has legislation compelling the state police to forward sex offender registrations to the FBI for inclusion in NSOR. MCL 28.727(8).

The registration information in the NSOR must include the individual's current address, current photograph, and fingerprints. 42 USC 14072(c). This information must be released to federal, state, and local criminal justice agencies for law enforcement purposes, to federal state, and local governmental agencies responsible for conducting employment-related background checks under 42 USC 5119a, and to the community in certain circumstances. 42 USC 14072(j).

> **Note:** Registrations in NSOR may be accessed by contacting the Crimes Against Children Coordinator at your local FBI field office. General information about NSOR can be obtained via the world wide web at www.fbi.gov/hq/cid/cac/crimesmain.htm, which also has links to the individual state's sexual offender registries.

## K. Registration Violation Enforcement

**Venue for prosecution.** MCL 28.729(7)(a)–(c) establishes the following venues for prosecuting a failure to register, a failure to notify law enforcement within ten days of changing domicile out of state, and a failure to verify domicile or residence, as follows:

- the individual's last registered address or residence;
- the individual's actual address or residence; or
- where the individual was arrested for the violation.

**Penalties.** Willful violations of the Act are punished under MCL 28.729(1)–(6), as follows:

- No Prior Convictions

An individual having no prior convictions for a violation of this Act, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than four years or a maximum $2,000.00 fine, or both. MCL 28.729(1)(a).

- One Prior Conviction

An individual having one prior conviction for a violation of this Act, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than seven years or a maximum $5,000.00 fine, or both. MCL 28.729(1)(b).

- Two or More Prior Convictions

An individual having two or more prior convictions for a violation of this Act, other than a failure to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a felony punishable by imprisonment for not more than ten years or a maximum $10,000.00 fine, or both. MCL 28.729(1)(c).

- Failure to Comply with Yearly or Quarterly Verification

An individual who fails to comply with MCL 28.725a (yearly and quarterly verification), is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a maximum $500.00 fine, or both. MCL 28.729(2).

- Failure to Comply with Registration Form Requirements

An individual who willfully fails to sign a registration, notice, or verification as provided in MCL 28.727(4) (registration form), is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $500.00 fine, or both. MCL 28.729(3).

Effective October 1, 2002, 2002 PA 542 amended the maximum penalties for an individual who fails to comply with MCL 28.725a (yearly and quarterly verification) from 90 days or a maximum fine of $500.00 to **93 days or a maximum fine of $1,000.00**. MCL 28.729(2).

Effective October 1, 2002, 2002 PA 542 amended the maximum fine for an individual who willfully fails to sign a registration, notice, or verification as provided in MCL 28.727(4) (registration form) from $500.00 to **$1,000.00**. MCL 28.729(3).

**Additional mandatory penalties.** In addition to any of the foregoing penalties, MCL 28.729(4)–(6) mandate the following sanctions, if applicable:

— The court shall revoke probation of an individual who willfully violates the Act while on probation.

— The court shall revoke the youthful trainee status of an individual who willfully violates the Act while assigned to youthful trainee status.

— The parole board shall rescind the parole of an individual who willfully violates the Act while released on parole.

## L. Pertinent Case Law Challenging Registration Act

**Retroactive application permissible.** Retroactive application of the Sex Offenders Registration Act does not violate the Ex Post Facto Clauses of the Michigan or United States Constitution. See *People v Pennington*, 240 Mich App 188, 197 (2000), adopting the analyses in *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998) and *Doe v Kelley*, 961 F Supp 1105 (WD Mich, 1997), which both held that Michigan's registration provisions are not punitive.

**Not cruel and unusual punishment under U.S. Constitution.** The Act's registration and notification requirements are not "punishment" and therefore do not violate the U.S. Constitution's Eighth Amendment prohibition against cruel and unusual punishment. *Lanni v Engler*, *supra* at 853–54 (ED Mich, 1998).

**Not cruel or unusual punishment under Michigan Constitution.** The Act's registration requirements are not "punishment" and therefore do not constitute cruel or unusual punishment under Const 1963, art 1, § 16. *In re Ayres*, 239 Mich App 8 (1999). The Court of Appeals in *In re Ayres* ruled only on the Act's registration requirements, not its notification requirements. However, it adopted, along with the Court in *People v Pennington*, *supra* at 197, the analyses in two U.S. District Court opinions, *Lanni v Engler*, *supra*, and *Doe v Kelley*, *supra*, which held that the Act's registration *and* notification requirements do not constitute "punishment."

**No violation of Double Jeopardy, Equal Protection, or Due Process under U.S. Constitution.** The Act's registration and community notification provisions do not constitute criminal "punishment" and therefore do not violate the Double Jeopardy Clause of the U.S. Constitution. *Lanni v Engler*, *supra* at 854.

The Act does not violate the Equal Protection Clause of the U.S. Constitution because defendant, as a sex offender, is not in a "suspect class," and the Act is reasonably related to the government's legitimate interest of protecting the public. *Id*. at 855.

The Act does not deprive a sex offender of a protected liberty or property interest and therefore does not violate the procedural provisions of the U.S. Constitution's Due Process Clause. *Id*. See also *Doe v Kelly*, *supra* at 1112.

The Act's notification provisions do not deprive a sex offender of a right to privacy and therefore do not violate substantive due process, because "the information made public by the Act is already a matter of public record, to which no privacy rights attach." *Lanni v Engler*, *supra* at 856. See also *Doe v Kelly*, *supra* at 1112.

**Due process under Michigan Constitution.** In a case of first impression, the Court of Appeals in *In re Wentworth,* 251 Mich App 560 (2002), held that SORA's requirements are not an unconstitutional infringement of

defendant's protected liberty, property, or privacy interests, and that the state is not required to engage in due process beyond that afforded in defendant's juvenile court proceedings. The Court held that SORA did not deprive defendant of any privacy interest since the public dissemination of defendant's personal information is truthful and already a matter of public record. *Id*. at 563–67. The Court further held that SORA did not deprive defendant of any liberty interest, and that any deprivation suffered by defendant flowed not from SORA but from the defendant's own misconduct that resulted in the juvenile disposition. Further, the Court held that, "even if SORA deprived defendant of liberty, she was afforded due process, i.e., notice and opportunity to be heard, through the family court proceedings prior to entry of the order of disposition." *Id*. at 565. Finally, the Court held that SORA did not violate the exclusive jurisdiction of the family division of circuit court since SORA's requirements do not confer jurisdiction to the Michigan State Police over juveniles but rather only implementation and enforcement responsibilities.

**HYTA defendants must comply with Act's requirements.** A defendant convicted of a "listed offense" and sentenced pursuant to the Holmes Youthful Trainee Act (HYTA), MCL 762.11 et seq., must comply with the requirements of the Sex Offenders Registration Act before *and* after discharge from youthful trainee status. *People v Rahilly*, 247 Mich App 108 (2001).

**Juvenile offenders.** Juvenile offenders not tried as adults are exempt from the Act's public notification provisions. *In re Ayres*, *supra* at 12.

A juvenile offender and his parents were not denied the equal protection of laws when the juvenile listed his parents' address as his address under the Act, because the information regarding the juvenile is not available to the public and does not constitute punishment. *In re Whittaker*, 239 Mich App 26, 31 (1999).

**Failure to register—mens rea requirement.** A violation of MCL 28.729 for a "willful" failure to register or notify a law enforcement agency of an address change within ten days of the change is not a specific intent crime. Instead, the crime requires proof of something less than specific intent, i.e., proof of a "knowing exercise of choice." In *People v Lockett*, ___ Mich App ___ (2002), the defendant notified his Department of Corrections probation officer of his address change but failed to notify the local law enforcement agency. At the conclusion of defendant's preliminary examination, the district court dismissed the charge, concluding that defendant had not acted "willfully" by failing to notify the local law enforcement agency of his address change, even though the probation officer testified to specifically telling each of his probationers that address change updates must be made at the police station, not the probation office. The circuit court affirmed. After acknowledging that the issue of whether an omission can constitute "willfulness" is "an extremely murky area," the Court of Appeals held first that defendant's notification to his probation officer was insufficient to

constitute notification to a "local law enforcement agency" under SORA. Next, the Court held that although it agreed with the district court's conclusion that the term "willfully" under MCL 28.729 "requires something less than specific intent, [and] requires a knowing exercise of choice," it disagreed with the district court's conclusion that there was "no evidence" to support a finding of "willfulness." The Court specifically found that the probation officer's testimony was "sufficient to establish probable cause to believe that defendant knew he was required to update his address with the police department whenever he moved and that he purposely failed to do so." *Id*. at ___. Thus, the Court remanded the case to the district court with instructions to bind defendant over for trial in circuit court.

## 25.19 DNA Profiling Requirements

Michigan's "DNA Identification Profiling System Act," MCL 28.171 et seq., which took effect on June 17, 1994, is part of the national Combined DNA Index System (CODIS) that links together existing state DNA databases. Michigan's Act requires the *collection* of blood, saliva, or tissue samples from selected criminal and juvenile offenders, along with the *retention* of the resultant "DNA identification profiles." The Act works in conjunction with five other statutes, each requiring a certain class of criminal and juvenile offenders to provide DNA samples for a type of offense. The classes of offenders are as follows:

- a person* convicted of any felony, attempted felony, or specified misdemeanor on or after January 1, 2002, MCL 750.520m (penal code);
- a juvenile found responsible for a specified offense on or after January 1, 2002, MCL 712A.18k(1) (juveniles); and
- a person in custody
  - — a person in prison on or after January 1, 2002, MCL 791.233d (prisoners under jurisdiction of DOC);
  - — a juvenile committed to the Family Independence Agency based on being convicted of or found responsible for a specified offense on or after January 1, 2002, MCL 803.225a(1) (juveniles committed to FIA);
  - — a juvenile who is a public ward based on being convicted of or found responsible for a specified offense on or after January 1, 2002, MCL 803.307a(1) (public wards).

*Including a juvenile convicted through "waiver" or "designation."

The remaining subsections discuss Michigan's DNA Identification Profiling System Act, including the interplay with the foregoing statutes. Each subsection is generally broken down by class of offenders as listed above.

The requirements for the collection and retention of DNA samples and identification profiles are in addition to the testing/counseling requirements for communicable diseases, such as venereal disease, hepatitis, HIV, and AIDS. For more information on those requirements, see Section 25.20.

## A. Persons Required to Provide Blood, Saliva, or Tissue Samples

All offenders meeting the requirements detailed below must provide a DNA sample, unless at the time the person is required to provide the sample the investigating law enforcement agency or state police already has a sample from the person that meets the requirements of the DNA Identification Profiling System Act, MCL 28.171 et seq. See MCL 28.176(3) (DNA Identification Profiling System Act), MCL 750.520m(2) (penal code), MCL 712A.18k(2) (juveniles), MCL 803.225a(2) (juveniles committed to FIA), MCL 803.307a(2) (public wards), and MCL 791.233d(1) (prisoners under jurisdiction of DOC).

*See SCAO Form MC 283.

**Persons convicted on or after January 1, 2002.** A person, including a juvenile "waived" into the criminal division of circuit court or "designated" to be tried as an adult in family division of circuit court, who is convicted on or after January 1, 2002, of any one of the following offenses is required under MCL 750.520m(1)(b) to provide a blood, saliva, or tissue sample for DNA testing:*

*A "felony" means "a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 750.520m(10)(c).

- a felony or attempted felony;*
- any of the following misdemeanors or local ordinances substantially corresponding to the following misdemeanors:
  - accosting, enticing, or soliciting a child, MCL 750.145a;
  - disorderly person (window peeping), MCL 750.167(1)(c);
  - disorderly person (indecent or obscene conduct), MCL 750.167(1)(f);
  - disorderly person (loitering in house of prostitution), MCL 750.167(1)(i);
  - indecent exposure, MCL 750.335a;
  - prostitution (first and second violations), MCL 750.451;
  - leasing a house for prostitution, MCL 750.454; or
  - female under 17 in house of prostitution, MCL 750.462.

*See SCAO Form MC 283.

**Juveniles found responsible on or after January 1, 2002.** A juvenile found responsible on or after January 1, 2002, for any one of the following offenses is required under MCL 750.520m(1)(a) to provide a blood, saliva, or tissue sample for DNA testing:*

- assault with intent to commit murder, MCL 750.83;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- manslaughter, MCL 750.321;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e;
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- an attempted violation of kidnapping or any of the foregoing criminal sexual conduct offenses;
- disorderly person (window peeper), MCL 750.167(1)(c), and (indecent or obscene conduct), MCL 750.167(1)(f);
- indecent exposure, MCL 750.335a; or
- a local ordinance substantially corresponding to the foregoing disorderly person and indecent exposure statutes.

**Persons in custody on or after January 1, 2002.** A person in prison under the custody of the Department of Corrections on or after January 1, 2002, must not be released on parole, placed in a community placement facility, including a community corrections center or a community residential home, or discharged upon completion of his or her maximum sentence, until he or she has provided a blood, saliva, or tissue sample for DNA testing. MCL 791.233d(1). However, a prisoner is not required to provide a sample or pay an assessment fee if, at the time the prisoner is to be released, placed, or discharged, the state police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act. MCL 791.233d(1).*

*Unlike the testing requirements for juveniles and public wards detailed below, the testing requirements for prisoners is not predicated upon the type of convicted offense.

A juvenile who is under the supervision of the Family Independence Agency or a county juvenile agency because of being convicted of an offense in Section 25.21(A), or found responsible for an offense in Section 25.21(A), must not be placed in a community placement of any kind until he or she has provided a sample for chemical testing. MCL 803.225a(1). However, a juvenile under FIA supervision is not required to provide a sample or pay an assessment fee if, at the time the juvenile is convicted or

found responsible, the state police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act. MCL 803.225a(2).

*See Section 25.8, above, for definitions of "public ward" and "youth agency."

A public ward who on or after January 1, 2002, is under a youth agency's* jurisdiction because of being convicted of an offense in Section 25.21(A), or found responsible for an offense in Section 25.21(A), must not be placed in a community placement of any kind or be discharged from wardship until he or she has provided a sample for chemical testing. MCL 803.307a(1). However, a public ward is not required to provide a sample or pay an assessment fee if, at the time the public ward is convicted or found responsible, the state police already has a sample from the prisoner that meets the requirements of the DNA Identification Profiling System Act. MCL 803.307a(2).

## B. Responsible Agency and Timeframe of Sample Collection

The following subsections specify the agencies responsible for the collection of a person's blood, saliva, or tissue sample for DNA testing, as well as the applicable timeframes for the collection of samples.

*See Section 25.19(H) for a definition of "investigating law enforcement agency."

**Persons convicted on or after January 1, 2002.** For a person convicted on or after January 1, 2002, of an offense listed in Section 25.21(A), including a juvenile convicted through waiver, the court must order the county sheriff or investigating law enforcement agency* to collect the blood, saliva, and tissue sample. MCL 750.520m(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency's possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id*.

For a juvenile convicted in a designated proceeding on or after January 1, 2002, of an offense listed in Section 25.21(A), the court must order only the investigating law enforcement agency to collect the blood, saliva, and tissue sample. MCL 712A.18k(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency's possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id*.

*See Section 25.19(H) for a definition of "investigating law enforcement agency."

**Juveniles found responsible on or after January 1, 2002.** For a juvenile found responsible on or after January 1, 2002, for an offense listed in Section 25.21(A), the court must order only the investigating law enforcement agency* to collect a blood, saliva, and tissue sample. MCL 712A.18k(3). The sample must be collected after a finding of responsibility but before disposition and promptly forwarded, along with any samples already in the agency's possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id*.

**Persons in custody on or after January 1, 2002.** For a person in prison under the jurisdiction of the Department of Corrections (DOC) on or after January 1, 2002, the DOC is responsible for collecting a blood, saliva, or tissue sample before releasing the prisoner on parole, placing the prisoner in a community placement facility of any kind, including a community corrections center or a community residential home, or discharging the prisoner upon completion of his or her maximum sentence. MCL 791.223d(1). The sample must be promptly forwarded, along with any samples already in the agency's possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id*. No court order or hearing is required to collect a sample, and it may be collected regardless of the person's consent. MCL 791.233d(3).

For a juvenile who on or after January 1, 2002, is under the supervision of the Family Independence Agency or a county juvenile agency because of being (1) convicted of any offense listed in Section 25.21(A), or (2) found responsible for any offense listed in Section 25.21(A), the FIA or county juvenile agency, whichever applies, is responsible for collecting a blood, saliva, or tissue sample before the juvenile is placed in a community placement of any kind or before discharge from wardship. MCL 803.225a(1). The sample must be promptly forwarded, along with any samples already in the agency's possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id*. No court order or hearing is required to collect a sample, and it may be collected regardless of the juvenile's consent. MCL 803.225a(4).

For a public ward who on or after January 1, 2002, is under a youth agency's* jurisdiction because of being (1) convicted of any offense listed in Section 25.21(A), or (2) found responsible for any offense listed in Section 25.21(A), the youth agency is responsible for collecting a blood, saliva, or tissue sample before the public ward is placed in a community placement of any kind or before discharge from wardship. MCL 803.307a(1). The sample must be promptly forwarded, along with any samples already in the agency's possession, to the state police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the state police. *Id*. No court order or hearing is required to collect a sample, and it may be collected regardless of the public ward's consent. MCL 803.307a(4).

*See Section 25.8, above, for definitions of "public ward" and "youth agency."

## C. Retention of DNA Identification Profiles

**Permanent retention.** If a person meets the requirements in Sections 25.21(A)–(B), above, the state police must permanently retain a DNA identification profile* obtained from a sample in the manner prescribed under the DNA Identification Profiling System Act. MCL 28.176(1).

*See Section 25.19(H) for a definition of "DNA identification profile."

**Temporary retention.** All other DNA identification profiles need only be retained as long as they are needed for a criminal investigation or prosecution. MCL 28.176(11). This temporary retention includes samples determined by the state police forensic laboratory to have been submitted by a person eliminated as a suspect in a crime. MCL 28.176(12).

## D. Disclosure Limitations

*See Section 25.19(H) for a definition of "DNA identification profile."

The DNA identification profile* of a DNA sample shall only be disclosed as follows:

- to a criminal justice agency for law enforcement identification purposes;
- in a judicial proceeding as authorized or required by a court;
- to a defendant in a criminal case if the DNA profile is used in conjunction with a charge against the defendant; and
- for an academic, research, statistical analysis, or protocol developmental purpose.

MCL 28.176(2)(a)–(d) (DNA Identification Profiling System Act), MCL 750.520m(5)(a)–(d) (Penal Code), MCL 712A.18k(10)(a)–(d) (juveniles), MCL 803.225a(5)(a)–(d) (juveniles committed to FIA), MCL 803.307a(5)(a)–(d) (public wards), and MCL 791.233d(5)(a)–(d) (prisoners under jurisdiction of DOC).

## E. Ordering and Distribution of Assessment Fees

*A court order is required under these statutes.

**Persons convicted or found responsible.** A person who is required to provide a DNA sample under Sections 25.21(A)–(B), above, must pay a $60.00 DNA assessment fee. MCL 28.176(5) (DNA Identification Profiling System Act), MCL 750.520m(6) (Penal Code), and MCL 712A.18k(4) (juveniles).* However, a person is not required to provide a sample or pay the fee if a sample already exists and meets the requirements of the DNA Identification Profiling System Act. MCL 28.176(3) (DNA Identification Profiling System Act), MCL 750.520m(2) (Penal Code), and MCL 712A.18k(2) (juveniles).

The assessment fee is in addition to any fines, costs, or other assessments imposed by the court. MCL 28.176(5) (DNA Identification Profiling System Act), MCL 750.520m(6) (Penal Code), and MCL 712A.18k(4) (juveniles).

The assessment fee must be ordered on the record and listed separately in the adjudication order, judgment of sentence, or order of probation. MCL 28.176(6) (DNA Identification Profiling System Act), MCL 750.520m(7) (Penal Code), and MCL 712A.18k(5) (juveniles).

The court may, after reviewing a verified petition, suspend payment of all or part of the assessment fee if it determines the person is unable to pay the assessment. MCL 28.176(7) (DNA Identification Profiling System Act), MCL 750.520m(8) (Penal Code), and MCL 712A.18k(6) (juveniles).

The court must distribute all DNA assessments or portions of DNA assessments as follows:

- 10% to the court;
- 25% to the county sheriff or other investigating law enforcement agency that collected the DNA sample as designated by the court, which must be transmitted by the clerk of the court on the last day of every month; and
- 65% to the Department of Treasury for the State Police Forensic Science Division, which must be transmitted by the clerk of the court on the last day of every month.

MCL 28.176(8) (DNA Identification Profiling System Act), MCL 750.520m(9) (Penal Code), and MCL 712A.18k(7) (juveniles).

**Persons in custody.** A prisoner, juvenile, or public ward* who is required to provide a DNA sample must pay a $60.00 assessment fee. MCL 791.233d(4) (prisoners under jurisdiction of DOC), MCL 803.225a(6) (juveniles committed to FIA), and MCL 803.307a(6) (public wards). No court order is required. However, the prisoner, juvenile, or public ward is not required to provide a sample or pay the fee if a sample already exists and meets the requirements of the DNA Identification Profiling System Act. MCL 791.233d(1) (prisoners under jurisdiction of DOC), MCL 803.225a(2) (juveniles committed to FIA), and MCL 803.307a(2) (public wards).

*See Section 25.8, above, for the definition of "public ward."

The responsible department or agency must transmit the assessments or portions of assessments to the Department of Treasury for the state police forensic science division to defray the costs associated with the requirements of DNA profiling and retention. MCL 791.233d(4) (prisoners under jurisdiction of DOC), MCL 803.225a(6) (juveniles committed to FIA), and MCL 803.307a(6) (public wards).

## F. Criminal Penalties for Resisting or Refusing to Provide Samples

A person who resists or refuses to provide a sample for DNA identification profiling that is required by law is guilty of a misdemeanor punishable by imprisonment for not more than one year or a maximum $1,000.00 fine, or both. MCL 28.173a(1). To be convicted of or found responsible for this offense, the person must be advised that resistance or refusal to provide a sample is a misdemeanor. *Id*. A person is not required to provide a sample if, at the time the person is required to provide the sample, the investigating

law enforcement agency or state police already has a sample from the person that meets the requirements of the rules promulgated under the DNA Identification Profiling Act. MCL 28.173a(2).

## G. Disposal of Samples and DNA Identification Profile Records

**Person eliminated as suspect.** If the state police forensic laboratory has determined that a sample has been submitted by a person who has been eliminated as a suspect in a crime, it must dispose of the sample in accordance with MCL 333.13811 (disposal of medical waste). MCL 28.176(12)(a). Additionally, the disposal of the sample or DNA identification profile record must be done in the presence of a witness. MCL 28.176(12)(a). After disposal of the sample or DNA identification profile record, the laboratory must make and keep a record of the disposal, signed by the person who witnessed the disposal. MCL 28.176(13).

**Reversal of conviction by appellate court.** If a person has not more than one conviction reversed by an appellate court, he or she may petition the sentencing court to order the disposal of the sample and DNA identification profile record for that conviction. MCL 28.176(10). The person has the burden of proof by "clear and convincing evidence that the conviction was reversed based upon the great weight of the evidence," which means specifically that "there was overwhelming evidence against the verdict resulting in a miscarriage of justice." *Id*.

## H. Definition of Terms

"DNA identification profile" means "the results of the DNA identification profiling of a sample." MCL 28.172(b) (DNA Identification Profiling Act). See also MCL 750.520m(11)(a) (Penal Code), and MCL 712A.18k(11)(a) (juveniles). "DNA identification profiling" means "a validated scientific method of analyzing components of deoxyribonucleic acid molecules in a biological specimen to determine a match or a nonmatch between a reference sample and an evidentiary sample." MCL 28.172(c) (DNA Identification Profiling Act). See also MCL 750.520m(11)(a) (Penal Code), and MCL 712A.18k(11)(a) (juveniles).

"Investigating law enforcement agency" means "the law enforcement agency responsible for the investigation of the offense for which the individual is convicted. Investigating law enforcement agency includes the county sheriff but does not include a probation officer employed by the department of corrections." MCL 28.172(e) (DNA Identification Profiling Act). See also MCL 750.520m(11)(b) (Penal Code), and MCL 712A.18k(11)(c) (juveniles).

"Sample" means "a portion of an individual's blood, saliva, or tissue collected from the individual." MCL 28.172(f) (DNA Identification Profiling Act). See also MCL 750.520m(11)(d) (Penal Code), MCL

712A.18k(11)(d) (juveniles), MCL 803.307a(7)(b) (public wards), MCL 803.225a(7)(a) (juveniles committed to FIA), and MCL 791.233d(6) (prisoners).

## 25.20 Required Communicable Disease Testing

### A. Mandatory Testing or Examination of Juveniles Bound Over for Trial in the Criminal Division

If a defendant is bound over to the Criminal Division for a violation of any of several enumerated offenses, and if the district court determines there is reason to believe the violation involved sexual penetration or exposure to the body fluid of the defendant, the district court must order the defendant to be examined or tested for venereal disease and hepatitis B infection and for the presence of HIV or an antibody to HIV. MCL 333.5129(3).

The enumerated offenses are:

- accosting, enticing, or soliciting child for immoral purposes, MCL 750.145a;
- gross indecency between male persons, MCL 750.338;
- gross indecency between female persons, MCL 750.338a;
- gross indecency between male and female persons, MCL 750.338b;
- aiding and abetting prostitution, MCL 750.450;
- keeping, maintaining, or operating a house of prostitution, MCL 750.452;
- pandering, MCL 750.455;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e; and
- assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 333.5129(3).

Two of the offenses, accosting, enticing, or soliciting child for immoral purposes, MCL 750.145a, and aiding and abetting prostitution, MCL 750.450, are misdemeanors, for which no bindover would occur.

Because first-degree criminal sexual conduct, MCL 750.520b, is a "specified juvenile violation," this provision is applicable to "automatic" waiver to the Criminal Division under MCL 712A.2(a)(1) and MCL 600.606, for 14, 15, and 16 year olds. This provision does not apply to "traditional" waiver cases because waived juveniles proceed directly to the Criminal Division for arraignment on an information, not to district court. MCL 712A.4(10). Nor does it appear to apply to cases that have been designated for criminal proceedings in the Family Division pursuant to MCL 712A.2d because MCL 333.5129(3) requires that the juvenile must be bound over to the Criminal Division, whereas in designated proceedings the trial occurs in the Family Division.

## B. Mandatory Testing or Examination Following Juvenile Adjudication or Conviction

MCL 333.5129(4) states that upon conviction of a defendant or the issuance by the Family Division of an order adjudicating a child to be within the provisions of MCL 712A.2(a)(1) for a violation of any of the following offenses, the court having jurisdiction of the criminal prosecution or juvenile hearing must order the defendant or child to be examined or tested for venereal disease and hepatitis B infection and for the presence of HIV or an antibody to HIV.

Thus, testing is mandatory following an adjudication of delinquency or a conviction following a waiver proceeding or designated proceeding in the Family Division. The court must also order the juvenile or defendant to receive counseling regarding these diseases. MCL 333.5129(2) and (4).

The offenses are:

- accosting, enticing, or soliciting child for immoral purposes, MCL 750.145a;
- gross indecency between male persons, MCL 750.338;
- gross indecency between female persons, MCL 750.338a;
- gross indecency between male and female persons, MCL 750.338b;
- soliciting prostitution, MCL 750.448;
- admitting to place for purpose of prostitution, MCL 750.449;
- engaging services for purposes of prostitution, MCL 750.449a;
- aiding and abetting prostitution, MCL 750.450;
- keeping, maintaining, or operating a house of prostitution, MCL 750.452;

- pandering, MCL 750.455;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e;
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- intravenous use of controlled substance, MCL 333.7404; and
- a local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance. MCL 333.5129(4).

## C. Disclosure of Results to Victim

In cases involving sexual penetration, sexual contact, or exposure to the defendant's or juvenile's body fluids, if the victim consents, the court must provide the person or agency conducting the mandatory examinations or tests with the name, address, and telephone number of the victim, and the person or agency must notify the victim immediately of the results and refer the victim for appropriate counseling. If the victim is a minor or otherwise incapacitated, the victim's parent, guardian, or person in loco parentis may give the required consent. MCL 333.5129(5).

## D. Confidentiality of Test Results

Except as provided in MCL 333.5129(1) (disclosure by testing agency to defendant and health departments for partner notification), MCL 333.5129(5) (victim notification by testing agency), or in MCL 333.5129(6)–(7) (disclosure made part of court record but held confidential), the examinations or tests and results are confidential. All records, reports, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to partner notification under MCL 333.5114a are also confidential. MCL 333.5131(1).

MCL 333.5129(6) states that the examination or test results and any other medical information obtained from the defendant or child must be transmitted to the court and, after the defendant or child is sentenced or an order of disposition is entered, made part of the court record, but are confidential and shall be disclosed only to:

- the defendant or child;
- the local health department;

- the state public health department;
- the victim or person acting for the victim as provided in MCL 333.5129(5);
- to another person upon written authorization of the defendant or child found to be within the provisions of MCL 712A.2(a)(1), or the child's parent, guardian, or person in loco parentis; and
- as otherwise provided by law.

MCL 333.5129(7) allows for transmission of the examination or test results to the Department of Corrections if the defendant is placed in its custody, and to the relative or public or private agency, institution, or facility with whom a child is placed by the Family Division. A person or agency that receives test results or other medical information pertaining to HIV infection or acquired immunodeficiency syndrome under MCL 333.5129(6)–(7) is subject to the provisions of MCL 333.5131 and may only disclose information pursuant to that provision. MCL 333.5129(7).

Test results or the fact that testing was ordered to determine the presence of HIV infection or acquired immunodeficiency syndrome are subject to the physician-patient privilege, MCL 600.2157. MCL 333.5131(2).